

NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 211

19 APRIL 2011

3 MAY 2011

RALEIGH
2014

CITE THIS VOLUME
211 N.C. APP.

TABLE OF CONTENTS

Judges of the Court of Appeals v

Table of Cases Reported vii

Table of Cases Reported Without Published Opinions viii

Opinions of the Court of Appeals 1-647

Headnote Index 649

**This volume is printed on permanent, acid-free paper in compliance
with the North Carolina General Statutes.**

**THE COURT OF APPEALS
OF
NORTH CAROLINA**

Chief Judge

JOHN C. MARTIN

Judges

LINDA M. McGEE

ROBERT C. HUNTER

WANDA G. BRYANT

ANN MARIE CALABRIA

RICHARD A. ELMORE

SANFORD L. STEELMAN, JR.

MARTHA GEER

LINDA STEPHENS

DONNA S. STROUD

ROBERT N. HUNTER, JR.

SAMUEL J. ERVIN IV

J. DOUGLAS McCULLOUGH

CHRIS DILLON

MARK DAVIS

Emergency Recalled Judges

GERALD ARNOLD

JOHN B. LEWIS, JR.

DONALD L. SMITH

JOHN M. TYSON

RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD

SIDNEY S. EAGLES, JR.

Former Judges

WILLIAM E. GRAHAM, JR.

JAMES H. CARSON, JR.

J. PHIL CARLTON

BURLEY B. MITCHELL, JR.

HARRY C. MARTIN

E. MAURICE BRASWELL

WILLIS P. WHICHARD

DONALD L. SMITH

CHARLES L. BECTON

ALLYSON K. DUNCAN

SARAH PARKER

ELIZABETH G. McCRODDEN

ROBERT F. ORR

SYDNOR THOMPSON

JACK COZORT

MARK D. MARTIN

JOHN B. LEWIS, JR.

CLARENCE E. HORTON, JR.

JOSEPH R. JOHN, SR.

ROBERT H. EDMUNDS, JR.

JAMES C. FULLER

K. EDWARD GREENE

RALPH A. WALKER

HUGH B. CAMPBELL, JR.

ALBERT S. THOMAS, JR.

LORETTA COPELAND BIGGS

ALAN Z. THORNBURG

PATRICIA TIMMONS-GOODSON

ROBIN E. HUDSON

ERIC L. LEVINSON

JOHN M. TYSON

JOHN S. ARROWOOD

JAMES A. WYNN, JR.

BARBARA A. JACKSON

CHERI BEASLEY

CRESSIE H. THIGPEN, Jr.

Administrative Counsel
DANIEL M. HORNE, JR.

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Bryan A. Meer
Eugene H. Soar
Yolanda Lawrence
Matthew Wunsche
Nikiann Tarantino Gray
David Alan Lagos

ADMINISTRATIVE OFFICE OF THE COURTS

Director
John W. Smith

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Allegra Collins
Jennifer Campbell Small

CASES REPORTED

	PAGE		PAGE
B. Kelley Enters., Inc. v. Vitacost.com, Inc.	592	Majewski Enters., Inc. v. The Parks at Langston, Inc.	525
Bogovich v. Embassy Club of Sedgfield, Inc.	1	McDowell v. Cent. Station Original Interiors, Inc.	159
Boyce & Isley, PLLC v. Cooper	469		
Cawthorn v. Mission Hosp., Inc.	42	Piraino Bros., LLC v. Atl. Fin. Grp., Inc.	343
Chase Dev. Grp. v. Fisher Clinard & Cornwell, PLLC	295	Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co. ...	252
Cheek v. Cheek	183	Puckett v. Norandal USA, Inc.	565
Crenshaw v. Williams	136		
D.G. II, LLC v. Nix	332	Rodriguez v. Rodriguez	267
D.P. Solutions, Inc. v. Xplore-Tech Servs. Private Ltd.	632		
E. Carolina Internal Med., P.A. v. N.C. Dep't of Health & Human Servs. ...	397	Sanchez v. Town of Beaufortv	574
Edgecombe Cnty. Dep't of Soc. Servs. v. Hickman	176	State v. Beckelheimer	362
Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't ...	627	State v. Brown	427
		State v. Clark	60
Feierstein v. N.C. Dep't of Env't & Natural Res.	194	State v. Cobos	536
Garlock v. Wake Cnty. Bd. of Educ. ...	200	State v. Debiase	497
Gentry v. Big Creek Underground Utils., Inc.	641	State v. Goode	637
Harty v. Underhill	546	State v. Green	599
Heatherly v. The Hollingsworth Co., Inc.	282	State v. Howell	613
In re D.M.	382	State v. Hunt	452
In re Estate of Gainey v. Southern Flooring & Acoustical Co.	233	State v. Leyshon	511
In re Foreclosure of Gilbert	483	State v. McLean	321
In re J.S.W.	620	State v. Nolan	109
In re V.M.	389	State v. Pell	376
Jones v. Wallis	353	State v. Stevenson	583
		State v. Womack	309
L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.	148	Stewart v. Hodge	605
		Stinchcomb v. Presbyterian Med. Care Corp.	556
		Stratton v. Royal Bank of Canada	78
		Sutton v. Driver	92
		U.S. Trust Co., N.A. v. Rich	168
		Urquhart v. East Carolina Sch. of Med.	124
		Walker v. Town of Stoneville	24
		Watson v. Brinkley	190
		Watson v. Price	369
		Williams v. Owens	393

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
Arce v. Bassett Furn. Indus., Inc.	197	State v. Coffield	198
B&K Coastal, LLC v. Triangle Grading & Paving, Inc.	197	State v. Cortez	198
Button v. McKnight	197	State v. Crudup	198
Campbell v. Campbell	645	State v. Davis	646
Colvin v. Wake Cnty.	645	State v. Dunn	198
Cory v. Debbie's Staffing Servs., Inc.	645	State v. Durham	198
Ford v. All-Dry of the Carolinas, Inc.	197	State v. Flint	646
Genworth Life & Annuity Ins. v. Abernathy	197	State v. Foust	646
Gerald v. Hous. Auth. of City of Durham	197	State v. Gill	198
Holden v. Brickey Acoustical, Inc.	645	State v. Haymond	646
Hunter v. Bowden	645	State v. Hill	198
Hunter v. Harris	645	State v. Johnson	198
In re D.T.H.	645	State v. Leskiw	198
In re D.Z.B.	645	State v. Little	646
In re H.K.L.	645	State v. Madden	198
In re J.O.W.	197	State v. Maxwell	646
In re J.T.K.	645	State v. McIntosh	646
In re K.R.	197	State v. McLeod	647
In re L.H.	645	State v. Midgette	647
In re Militana	197	State v. Mills	647
In re S.G.	645	State v. Nix	198
In re V.A.S.	645	State v. Orellana	647
James v. First Nat'l Ins. Co. of Am.	645	State v. Phifer	198
Joines v. Joines	646	State v. Prestwood	198
Nikopoulos v. Haigler	197	State v. Reid	198
Sampson Cnty. v. Parker Family Real Estate, LLC	197	State v. Robinson	199
Shalom House Apartments v. Safaro	197	State v. Roseboro	647
Smith v. Guy C. Lee Bldg. Materials	646	State v. Sanders	199
State v. Arrington	197	State v. Sebastian	647
State v. Barnett	646	State v. Singleton	199
State v. Bennett	646	State v. Smith	647
State v. Bobbitt	646	State v. Soots	199
State v. Camarata	646	State v. Standifer	199
State v. Clark	646	State v. Vasquez	199
		State v. Vereen	199
		State v. White	647
		State v. Wilkes	647
		State v. Worsham	199
		Steelman v. Select Med. Corp.	199
		Stoneworx, Inc. v. Robbins	647
		Trachtman Law Firm, PLLC v. Csapo	199
		Treadway v. Diez	647
		Tri-Arc Food Sys., Inc. v. Towns	647
		Vickers v. Street	647
		Walls v. City of Winston-Salem	199
		Wesley Chavis, Jr. Funeral Home v. Estate of Peter Radcliffe	199
		Williamson v. Windsor House One, LLC	647

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANNE BOGOVICH, PLAINTIFF V. EMBASSY CLUB OF SEDGEFIELD, INC.,
ROSS E. STRANGE, AND WIFE, ANNE STRANGE, DEFENDANTS

No. COA10-61

(Filed 19 April 2011)

1. Fraud— constructive fraud—breach of fiduciary duty

The trial court did not err by granting summary judgment in favor of plaintiff with respect to the constructive fraud claim based on a breach of fiduciary duty by defendant individuals. The execution and recordation of the notes and deeds of trust without prior approval, in amounts that greatly exceeded the value of their claimed loans, constituted a breach of fiduciary duty by defendants. Further, the evidence supported a reasonable inference that defendants' actions caused the corporation's property to remain unsold during the years that plaintiff paid the *ad valorem* taxes.

2. Unfair Trade Practices— summary judgment—constructive fraud

The trial court did not err by granting summary judgment in favor of plaintiff with respect to the unfair and deceptive trade practices claim given the upholding of summary judgment in favor of plaintiff for the constructive fraud claim.

3. Damages and Remedies— compensatory damages—causal connection-

The trial court did not err by submitting the issue of compensatory damages to the jury. The record did not establish that any claims adjudication procedure existed at the time the issue of damages was submitted to the jury. Further, plaintiff established

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

a causal connection between defendants' conduct and the unpaid *ad valorem* tax amounts.

4. Damages and Remedies— punitive damages—constructive fraud

The trial court did not err by submitting to the jury the issue of whether plaintiff was entitled to recover punitive damages from defendant individuals. Punitive damages are justified in cases of constructive fraud.

5. Statutes of Limitation and Repose— reimbursement for business expenses—no tolling of statute

The trial court did not err by concluding that defendant individuals' reimbursement claims for alleged monies advanced and other obligations related to the corporation that allegedly arose in the 1970s and 1980s were barred by the statute of limitations under N.C.G.S. § 1-52(1). Even if the applicable statute of limitations had been tolled until 1998, defendants never asserted a reimbursement claim.

Appeal by defendants from judgments entered 13 January 2009 and 30 March 2009 by Judge Catherine C. Eagles, from an order entered by Judge Eagles on 30 March 2009, and from an order entered 22 June 2009 by Judge Steve A. Balog, in Guilford County Superior Court. Heard in the Court of Appeals 18 August 2010.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer and Matthew Nis Leerberg, for Plaintiff-Appellee.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Defendant-Appellant.

ERVIN, Judge.

Defendants Ross E. Strange and Anne Strange appeal from an order granting summary judgment in favor of Plaintiff Anne Bogovich with respect to her claims of constructive fraud and unfair and deceptive trade practices, from a judgment entered in favor of Plaintiff based on a jury verdict awarding compensatory and punitive damages against the Stranges, an order denying the Stranges' request for the entry of judgment notwithstanding the verdict, and from an order denying the Stranges' claims for reimbursement of money allegedly owed to Defendants Ross and Ann Strange. After careful consideration of the Stranges' challenges to the judgments and orders at issue in this case

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

in light of the record and the applicable law, we conclude that the challenged judgments and orders should be affirmed.

I. Factual Background

A. Substantive Facts

Mr. Strange was born in 1928. At the time of trial, he had been a practicing attorney for forty-eight years. Plaintiff Anne Bogovich is Mr. Strange's older sister.

The litigation from which this appeal arises stems from the parties' ownership of Embassy Club, which was originally incorporated in 1971 by Mr. Strange, Art Lafata and Steven Kutos, all of whom owned an equal interest in the corporation. Embassy Club, which owned several acres of real property adjacent to the Sedgefield golf course, operated a private dinner club. The corporation purchased the shares owned by Mr. Lafata and Mr. Kutos in 1972 and 1973, respectively.

In 1973, Ms. Bogovich purchased fifty percent (50%) of the shares in the corporation. Ms. Bogovich and Mr. Strange are equal shareholders in and directors of Defendant Embassy Club; Mr. Strange is the corporation's president and treasurer; Ms. Bogovich is the corporation's vice president; and Ms. Strange is the corporation's secretary.

The corporation operated the dinner club from 1971 to 1976. Mr. Strange managed the club and its employees, performed physical work on the building, and had responsibility for the corporation's financial transactions and the maintenance of the corporation's records. Ms. Bogovich, who has lived in Florida since purchasing shares in Embassy Club, has not had any involvement in the daily operations of the corporation. In fact, Mr. Strange testified that Ms. Bogovich "had no idea what was going on as far as the records were concerned, as far as the corporation was concerned." Although Mr. Strange testified that he and Ms. Bogovich periodically discussed the corporation by telephone, he admitted that he never provided his sister with tax returns, balance sheets, or other corporate reports and records.

The dinner club operated by the corporation was never profitable. In December 1976, the dinner club and nearly all of Embassy Club's corporate records were destroyed in a fire. Since the fire, the corporation's property has not been used for any purpose.

In December 1998, Ms. Bogovich's attorney wrote Mr. Strange for the purpose of seeking information about "the status of the Embassy

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

Club” and informing Mr. Strange that Ms. Bogovich “would like to accomplish the following objectives, hopefully without the necessity of legal action: (1) [c]onveyance by the corporation of a half interest in all property owned by [the corporation] to [Ms. Bogovich], or (2) [d]issolution of the corporation with the conveyance of [one half] interest in all property owned by [the corporation] to her.” After no action was taken in response to this request, Ms. Bogovich’s attorney sent another letter to Mr. Strange in February 2000 requesting to be provided with an accounting and additional information about Mr. Strange’s efforts to sell Embassy Club’s property. Mr. Strange did not provide the requested information.

On 27 July 2000, Ms. Bogovich’s attorney wrote another letter to Mr. Strange’s attorney. In this letter, Ms. Bogovich’s attorney stated that Ms. Bogovich was prepared to initiate a civil action against Mr. Strange for breach of fiduciary duty and gave him 30 days to “make concrete efforts to sell the property.”

On 10 August 2000, Defendants Ross Strange and Anne Strange executed and recorded notes and deeds of trust on behalf of the corporation securing an alleged obligation from Embassy Club to the Stranges, as individuals, in an amount in excess of \$1,300,000.00. Mr. Strange admitted that he did not discuss these instruments with Ms. Bogovich before executing and recording them. In his deposition, Mr. Strange testified that he executed and recorded these notes and deeds of trust for the purpose of ensuring that, when Embassy Club’s property was sold, he would be repaid for monies that he claimed that the corporation owed him.

In his testimony, Mr. Strange attempted to substantiate his claim that Embassy Club owed him large amounts of money. For example, Mr. Strange testified that, beginning in the 1970s, he paid expenses associated with Embassy Club’s operations using personal funds and that, between 1971 and 1976, he had worked at least five days a week at the club, that he handled “all the book work,” and that he had performed legal services for the corporation. Mr. Strange did not, however, state that Ms. Bogovich had recognized the alleged advances as loans and admitted that he had “never discussed” payment for his alleged legal work with Ms. Bogovich, that he had not kept records documenting the nature and extent of his legal services, and that the two of them had never discussed an interest rate that would be applicable to the alleged loans. Even so, at the time when Embassy Club’s insurer settled the claim stemming from the dinner club fire,

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

Mr. Strange retained several thousand dollars as payment for his alleged prior legal services.

In addition, Mr. Strange testified that he expected to be reimbursed for the hours that he and Ms. Strange had worked at the dinner club from 1971 until the date upon which it closed and admitted that he had executed and recorded the notes and deeds of trust for the purpose, at least in part, of collecting monies that he and his wife were entitled to receive for working at the dinner club. However, Mr. Strange conceded that he and Ms. Bogovich had never discussed a specific amount of unpaid wages to which the Stranges were entitled and that Ms. Bogovich never executed a written agreement providing that he would receive a salary for his services.

Mr. Strange did not dispute that he had a fiduciary relationship with his sister. According to Mr. Strange, Ms. Bogovich “trusted that I would do what would be right.” Mr. Strange testified that he took out loans in the name of the corporation without authorization given his “friendly relationship with [his] sister.” Mr. Strange did not discuss the sale of Embassy Club’s property with Ms. Bogovich because his sister “always left everything up to” him. In response to questions addressing the extent of his communications with Ms. Bogovich about his right to receive a salary, Mr. Strange testified that Ms. Bogovich “just trusted” him and that they had “probably not” discussed a specific amount.

Mr. Strange testified that, ever since the dinner club building burned in 1976, he had been “attempting to sell the property” by placing signs on the land and communicating with potential buyers. Mr. Strange admitted, however, that he had declined a 2008 offer to purchase the property for \$1,500,000.00 without discussing it with Ms. Bogovich. Mr. Strange had not had the property professionally appraised or listed with a realtor because such actions “w[ere]n’t necessary” in view of the fact that he previously held a real estate license and was “familiar” with real estate valuation.

According to Mr. Strange, the notes and deeds of trust “were taken out solely because the Embassy Club owed that amount of money to me.” However, Mr. Strange conceded that there were errors in his claims for reimbursement. For example, Mr. Strange admitted that he had erroneously compounded interest in the course of determining how much he was owed and acknowledged that the amounts specified in the notes and deeds of trust were “more than likely” based upon compounded interest, were incorrect, and “would have to

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

be redone completely.” However, as of the date of his deposition, Mr. Strange had not taken any steps to correct these errors and admitted that, after he discovered these errors, “[he] didn’t change the Deeds of Trust, but they’re wrong.”

B. Procedural History

On 4 March 2004, Ms. Bogovich filed a complaint alleging that the notes and deeds of trust executed and recorded by the Stranges were invalid on the grounds that the Stranges’ conduct had defrauded Ms. Bogovich and reduced the value of her Embassy Club stock. As a result, Ms. Bogovich requested the court to invalidate the notes and deeds of trust, judicially dissolve Embassy Club, and award compensatory and punitive damages against the Stranges for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices. In their answer, Defendants admitted that the Stranges had encumbered Embassy Club’s real property by executing and recording the challenged notes and deeds of trust. However, Defendants denied that any of the Stranges’ activities had been unlawful.

On 11 November 2004, the parties reached a mediated settlement agreement that provided, in pertinent part, that Embassy Club’s property would be sold “to [a] *bona fide* purchaser for market value.” On 7 September 2005, this case was administratively closed.

On 13 March 2008, however, Ms. Bogovich filed a motion seeking to have the settlement agreement enforced. In her motion, Ms. Bogovich alleged that Mr. Strange had obstructed the sale of the Embassy Club property, had failed to list the property with a realtor, and had rejected an offer to purchase the property for \$1,500,000.00. In addition, Ms. Bogovich asserted that she had been paying the property taxes because the Stranges refused to do so.

On 10 April 2008, Judge Yvonne Mims Evans entered an order granting Ms. Bogovich’s motion to enforce the settlement. In her order, Judge Evans ruled that Mr. Strange had obstructed the sale of the Embassy Club property, that Mr. Strange had “refuse[d] to accept or negotiate[] *bona fide* offers” to purchase the property, and that Ms. Bogovich had “been paying [] all of the taxes on the [Embassy Club], because [Mr. Strange] [had] fail[ed] and refuse[d] to do so.” As a result, Judge Evans reopened this case for the purpose of enforcing the settlement agreement. On 15 May 2008, Ms. Bogovich filed a motion to set aside the order transferring this case to the inactive calendar. Judge Eagles granted this motion on 12 June 2008.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

On 24 December 2008, Ms. Bogovich moved for partial summary judgment. On 13 January 2009, Judge Eagles entered an order granting summary judgment in favor of Ms. Bogovich with respect to the constructive fraud and unfair and deceptive trade practices claims, invalidating the notes and deeds of trust, and ordering that the corporation be judicially dissolved and liquidated. According to Judge Eagles' order, "[t]he only issue remaining . . . is the amount of actual and punitive damages to which [Ms. Bogovich] is entitled to recover on her claims," with the issue "of attorneys' fees and treble damages" left "open" for later resolution.

On 14 January 2009, the parties stipulated that, in August 2000, the Stranges "executed . . . promissory notes and deeds of trust . . . in favor of themselves personally, encumbering the [r]eal [p]roperty" owned by Embassy Club and that the Stranges "are Officers of the Corporation," and "executed the Notes and Deeds of Trust in their official capacities as President and Secretary of the Corporation." The parties also stipulated that face value of the notes and deeds of trust totaled \$1,327,831.00.

The damage issue was heard before Judge Eagles and a jury beginning on 20 January 2009. On 23 January 2009, the jury returned a verdict finding the Stranges liable to Ms. Bogovich for \$12,165.00 in compensatory damages for breach of fiduciary duty, finding Mr. Strange liable to Ms. Bogovich for \$510,000.00 in punitive damages, and finding Ms. Strange liable to Ms. Bogovich for \$1.00 in punitive damages. Subsequently, the Stranges filed motions for judgment notwithstanding the verdict and for a new trial, which Judge Eagles denied on 30 March 2009. On the same date, Judge Eagles entered judgment in favor of Ms. Bogovich based upon the jury's verdict. Prior to entering judgment, Judge Eagles reduced the jury's punitive damage award against Mr. Strange from \$510,000.00 to \$250,000.00 as required by N.C. Gen. Stat. § 1D-25(b).

After the return of the jury's verdicts, the parties agreed that the Stranges' reimbursement claims would be heard by the court sitting without a jury. As a result, Judge Balog began conducting a nonjury proceeding for the purpose of addressing the claims reimbursement issue on 2 April 2009. On 22 June 2009, Judge Balog entered an order denying all of the Stranges' claims. Defendants noted an appeal to this Court from the 13 January 2009 order granting partial summary judgment in favor of Ms. Bogovich, the 30 March 2009 judgment, the 30 March 2009 order denying the Stranges' post-trial motions, and the 22 June 2009 order denying the Stranges' reimbursement request.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

II. Legal AnalysisA. Constructive Fraud

[1] First, the Stranges argue that Judge Eagles erred by granting summary judgment in favor of Ms. Bogovich with respect to her constructive fraud claim. In support of this contention, the Stranges assert that their “conduct had no aggravating factors and did not cause any disadvantage or harm to” Ms. Bogovich. The Stranges’ argument lacks merit.

Summary judgment is proper when, viewed in the light most favorable to the non-movant, “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c). The moving party initially bears the burden of demonstrating that no genuine issue of material fact exists. If the moving party makes the required showing, “the burden shifts to the nonmovant to adduce specific facts establishing a triable issue.” *Lunsford v. Renn*, — N.C. App. —, —, 700 S.E.2d 94, 97 (2010) (citing *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008), and quoting *Self v. Yelton*, — N.C. App. —, —, 688 S.E.2d 34, 38 (2010)). On appeal, the Stranges essentially concede that there are no disputed issues of material fact, acknowledging in their brief that “the issues raised in this appeal are questions of law, as to which the court must conduct *de novo* review.” Given our agreement that the pertinent facts are largely undisputed, we must next consider whether Ms. Bogovich was entitled to judgment in her favor with respect to the relevant claims as a matter of law.

The elements of a constructive fraud claim are proof of circumstances “(1) which created the relation of trust and confidence [the ‘fiduciary’ relationship], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.” Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

Keener Lumber Co. v. Perry, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002) (quoting *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981)). The Supreme Court has stated that:

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

“A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud.” . . . Thus, “[c]onstructive fraud differs from actual fraud in that it is based on a confidential relationship rather than a specific misrepresentation.” Another difference is that intent to deceive is not an element of constructive fraud. When, as here, the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred.

Forbis v. Neal, 361 N.C. 519, 528-29, 649 S.E.2d 382, 388 (2007) (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)), and citing *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)) (other citation omitted).

After carefully reviewing the record, we conclude that the undisputed evidence demonstrated that Ms. Bogovich established a valid constructive fraud claim based on a breach of fiduciary duty by the Stranges. The Stranges do not appear to deny that a fiduciary relationship existed between them and Ms. Bogovich. They acknowledge in their brief that, because Ms. Bogovich and Mr. Strange were directors of Embassy Club, “they stood in a mutual fiduciary relationship.” Since the Stranges also admit that Ms. Strange is an officer of Embassy Club, she also stands in a fiduciary relationship with Ms. Bogovich. In addition, the Stranges also admit that:

Mr. Strange prepared a series of promissory notes payable to himself and his wife secured by deeds of trust on the corporation’s real estate. The documents were signed by Mr. Strange as president of the corporation and [Ms.] Strange as secretary of the corporation. The notes and deeds of trust total approximately \$1.3 million. . . . Mr. Strange had no discussions with Ms. Bogovich about the notes and deeds of trust either before or after the date of their execution. There was no agreement of the parties on an interest rate. There was no formal approval of the loans. . . . The amounts claimed on the notes and deeds of trust were greatly in excess of money actually advanced by Mr. Strange to the corporation.

The execution and recordation of the notes and deeds of trust without proper approval, in amounts that greatly exceeded the value of their claimed loans, clearly constituted a breach of fiduciary duty on the part of the Stranges.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

However, according to Defendants, the improper execution and recordation of these notes and deeds of trust did not constitute a valid basis for Judge Eagles' decision to grant summary judgment in Ms. Bogovich's favor with respect to her constructive fraud claim because "[t]he only wrongful conduct that [Ms. Bogovich] was able to attribute to [the Stranges] were the execution of corporate notes and deeds of trust and recordation of deeds of trust on the corporation in their favor in the amount of approximately \$1.3 million." Although the Stranges effectively concede that they engaged in "wrongful conduct," they argue that their conduct was not sufficiently egregious to support a claim for constructive fraud. In essence, the Stranges contend that the "only breach of fiduciary duty that rises to the level of constructive fraud is that which has some significant aggravating factor, ordinarily the tendency to deceive, to violate a confidence, or to injure public interests." In support of this argument, the Stranges cite *Miller v. Bank*, 234 N.C. 309, 316, 67 S.E.2d 362, 367-68 (1951), in which the Supreme Court stated that:

Constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced. Constructive fraud has been frequently defined as "a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence or to injure public interests. Neither actual dishonesty nor intent to deceive is an essential element of constructive fraud."

(citing *Rhodes*, *id.*) (other citations omitted). The language upon which the Stranges rely specifically reiterates that an intent to deceive is not an element of constructive fraud and does not state that a "significant aggravating factor" must be proven in order to establish a valid constructive fraud claim. As a result, we conclude that this aspect of Defendants' challenge to Judge Eagles' partial summary judgment order rests upon a misapprehension of applicable law.

In addition, we reject the Stranges' argument that Ms. Bogovich was not entitled to summary judgment on her constructive fraud claim because (1) the Stranges had a valid reason for executing and recording the challenged notes and deeds of trust and (2) under appropriate circumstances, they would have been willing to cancel the challenged notes and deeds of trusts. In support of this contention, the Stranges assert that:

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

[T]he notes and deeds of trust were solely for the purpose of trying to insure that payments made to the corporation by [Mr.] Strange would be repaid, when the real estate of considerable value, the only remaining asset of the corporation, would be sold. The uncontradicted testimony of Mr. Strange is that he would have canceled the deeds of trust in order to facilitate the transaction, in the event a contract to sell the real estate was made.

The Stranges have not cited any authority demonstrating that a defendant's belief that he is entitled to reimbursement for alleged loans constitutes a valid defense to a constructive fraud claim, and we have located no such authority during our own research. The basis for Judge Eagles' determination that the Stranges violated their fiduciary duty to Ms. Bogovich stemmed from the fact that they executed and recorded the challenged notes and deeds of trust without proper authorization rather than because the Stranges chose to act in this manner for any particular reason. As a result, we conclude that the fact that the Stranges claimed that to be entitled to reimbursement for their claims and their contention that they would, under certain circumstances, have agreed to the cancellation of the challenged instruments does not preclude a finding that they breached their fiduciary duty to Ms. Bogovich.

Thirdly, the Stranges argue that Judge Eagles improperly granted summary judgment in favor of Ms. Bogovich with respect to her constructive fraud claim on the grounds that the execution and recordation of the notes and deeds of trust "did not cause any disadvantage or harm to" Ms. Bogovich. The Stranges do not dispute the fact that the challenged notes and deeds of trust constituted a lien on Embassy Club's property and admit that they executed and recorded these instruments "to insure that payments made . . . by [Mr.] Strange would be repaid, when the real estate . . . w[as] sold." In addition, the Stranges concede that "[t]he amounts claimed on the notes and deeds of trust were greatly in excess of money actually advanced by Mr. Strange to the corporation." As a result, the execution and recordation of the notes and deeds of trust significantly reduced the value of Ms. Bogovich's interest in the Embassy Club's assets, thus substantially "disadvantag[ing] or harm[ing]" her.

Fourth, the Stranges argue that Judge Eagles improperly entered summary judgment in favor of Ms. Bogovich with respect to the constructive fraud issue because Ms. Bogovich failed to establish the amount of compensatory damages to which she was entitled.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

However, Judge Eagles granted partial summary judgment in favor of Ms. Bogovich based on her un rebutted forecast of evidence tending to show a breach of fiduciary duty. Judge Eagles' summary judgment order specifically reserved the issue of the amount of actual damages which Ms. Bogovich was entitled to recover from the Stranges for determination by a jury. At bottom, the undisputed evidence established the existence of all of the elements required for a finding of liability for constructive fraud. According to well-established law, "[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages" *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992) (citations omitted).¹

In addition, the Stranges acknowledge that Ms. Bogovich claimed to be entitled to recover the monies that she spent paying *ad valorem* taxes relating to the Embassy Club's real property from 2005 through 2008 as compensatory damages. However, the Stranges argue that these tax payments "could not properly be regarded as damages" because these amounts were more properly treated as loans to the corporation recoverable through the claims reimbursement process.

At the time that Judge Eagles entered partial summary judgment in favor of Ms. Bogovich on 13 January 2009, no receiver had been appointed and the parties had not agreed to a "claims adjudication process." In fact, as late as the end of the damages proceeding before the jury, no "claims adjustment process" had been created. When the parties prepared to present their closing arguments to the jury on the damages issue, the Stranges requested Judge Eagles to preclude Ms. Bogovich's counsel from arguing that Ms. Bogovich was entitled to recover the *ad valorem* tax payments that she had made on behalf of the corporation as damages on the grounds that, after the appointment of a receiver, a claims adjudication proceeding would be conducted. In response, Judge Eagles stated that:

[DEFENSE COUNSEL]: . . . [W]e'd ask you to instruct the jury . . . that the Court has already determined there'll be an equal division of the net assets of [Embassy Club.]

[TRIAL] COURT: You know, I'm not going to get into that. . . . I have not appointed a receiver. I have not signed anything[.]

. . . .

1. The trial court instructed the jury, without objection by the Stranges, that Ms. Bogovich was entitled to recover at least nominal damages.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

[DEFENSE COUNSEL]: . . . I think [Ms. Bogovich's counsel] will say to the jury, you know who paid these taxes of \$13,500, and that's our monetary damage[.]

[PLAINTIFF'S COUNSEL]: . . . [T]hat's my damage issue.

[TRIAL] COURT: I think that is what she's going to say.

[DEFENSE COUNSEL]: I don't think she should say that[,] . . . [b]ecause those are claims, and they will be submitted in the claims adjudication process, just as our claims are.

. . . .

[TRIAL] COURT: You know, I have not made any decision. Because, when I looked at this case, there's nothing in the pleadings about these darned claims of Mr. Strange. And, you know, how that's going to be dealt with is just not here today.

[DEFENSE COUNSEL]: I'm not talking about his claims. I'm saying, she should not be allowed to bootstrap up on taxes, to say they're damages, when they truly are claims that will be presented to the receiver.

[TRIAL] COURT: I don't know that.

As a result, the record simply does not support the Stranges' contention that, at the time summary judgment was granted, a "claims adjudication process" under which Ms. Bogovich might have recovered her tax payments was in place. Furthermore, the Stranges have cited no authority establishing that, had a "claims adjustment process" existed, Plaintiff would have been required to seek relief through that process instead of seeking to recover those payments as damages, and we have not found any such authority during our own research.

Finally, the Stranges argue that their actions in encumbering the Embassy Club property did not proximately cause Ms. Bogovich to make the unpaid *ad valorem* tax payments. However, the undisputed evidence in the record shows that: (1) beginning in the mid to late 1990s, Ms. Bogovich repeatedly asked that the Embassy Club property be sold and that she be provided with various corporate records; (2) that the Stranges subjected Embassy Club's property to liens totaling in excess of \$1,000,000.00; (3) that Mr. Strange did not consult an appraiser or list the property for sale with a real estate agent; and (4) that Mr. Strange rejected offers to buy the property, including

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

a \$1,500,000.00 offer made in the year prior to trial, without consulting Ms. Bogovich. This uncontradicted evidence is sufficient to support a reasonable inference that the Stranges' actions caused the corporation's property to remain unsold during the years that Ms. Bogovich paid the *ad valorem* taxes, thereby establishing a valid basis for a compensatory damages award. As a result, for all of these reasons, we conclude that Judge Eagles did not err by entering summary judgment in favor of Ms. Bogovich with respect to her constructive fraud claim.

B. Unfair and Deceptive Trade Practices

[2] In addition to challenging Judge Eagles' decision to grant summary judgment in favor of Ms. Bogovich with respect to her constructive fraud claim, the Stranges argue that Judge Eagles erroneously granted summary judgment in Ms. Bogovich's favor with respect to her unfair and deceptive trade practices claim. In challenging this aspect of Judge Eagles' partial summary judgment order, the Stranges claim that "an intracorporate dispute cannot amount to an unfair trade practice." Having upheld Judge Eagles' decision to grant summary judgment in favor of Ms. Bogovich with respect to the constructive fraud issue, we need not address the merits of the Stranges' challenge to Judge Eagles' ruling concerning the unfair and deceptive trade practices claim. "Plaintiffs may in proper cases elect to recover either punitive damages under a common law claim or treble damages under [N.C. Gen. Stat.] § 75-16, but they may not recover both." *Ellis v. Northern Star Co.*, 326 N.C. 219, 227, 388 S.E.2d 127, 132 (1990) (citing *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 230, 333 S.E.2d 299, 306 (1985), and *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426-27, 344 S.E.2d 297, 301, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986)) (other citation omitted). In this case, as Judge Eagles' judgment plainly indicates, Ms. Bogovich elected to receive punitive damages rather than treble damages. "[T]o obtain relief on appeal, an appellant must not only show error, but . . . must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (citing *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 346 S.E.2d 168 (1986), *disc. review denied*, 318 N.C. 692, 351 S.E.2d 741 (1987)). The Stranges have not explained how any error that Judge Eagles may have committed with respect to the unfair and deceptive trade practices issue prejudiced them given our

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

decision to affirm her ruling with respect to the constructive fraud issue. As a result, the Stranges are not entitled to relief on the basis of their claim that Judge Eagles erred by granting summary judgment in Ms. Bogovich's favor with respect to the unfair and deceptive trade practices issue.

C. Compensatory Damages

[3] Next, the Stranges argue that Judge Eagles erred by submitting the issue of compensatory damages to the jury. According to the Stranges, there “was no basis for [the] recovery of compensatory damages in this case” because the *ad valorem* taxes that underlie Ms. Bogovich's compensatory damage claim “constitute recoverable claims in the dissolution and liquidation [process], not compensatory damages” and should be “recoverable by means of a claims adjudication procedure rather than as an element of damages.” As we have noted above, however, the record does not indicate that any “claims adjudication procedure” existed at the time the issue of damages was submitted to the jury. In addition, Defendants have cited no authority to the effect that *ad valorem* taxes may not be an element of damages. We note, for example, that in *SNML Corp. v. Bank*, 41 N.C. App. 28, 38, 254 S.E.2d 274, 280, *cert. denied*, 298 N.C. 204, 254 S.E.2d 274 (1979), the “trial court ordered that the plaintiff recover of appellant the sum of \$27,057.15, the precise amount of *ad valorem* taxes . . . which plaintiff was required to pay after all other parties failed to pay. The trial court was undoubtedly following the general rule that plaintiff was entitled to damages . . . which naturally and proximately are caused by the breach of defendant's duty to plaintiff.” *See also, e.g., Dawson v. Dep't of Env't & Nat. Resources*, — N.C. App. —, —, 694 S.E.2d 427, 429 (2010) (stating that the Commission “found DENR negligent and ordered DENR to pay the Dawsons damages for the purchase price, closing costs, lost earnings, appraisal fees, expert fees, and *ad valorem* taxes”). Finally, Ms. Bogovich established an adequate causal connection between the Stranges' conduct and the unpaid *ad valorem* tax amounts. As a result, the Stranges are not entitled to relief based upon this argument.

D. Punitive Damages

[4] Fourth, the Stranges contend that Judge Eagles erred by submitting the issue of whether Ms. Bogovich was entitled to recover punitive damages from the Stranges to the jury. We disagree.

N.C. Gen. Stat. § 1D-15 provides, in pertinent part, that:

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud[,], (2) Malice[, or] (3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

As an initial proposition, the Stranges argue that, “[b]ecause there were no recoverable compensatory damages,” Ms. Bogovich was not entitled to recover punitive damages. For the reasons we have already discussed, however, Judge Eagles did not err by concluding that Ms. Bogovich was entitled to the submission of a compensatory damages issue to the jury.

In addition, the Stranges assert that Ms. Bogovich sought to recover punitive damages “solely on the basis of fraud” and note the provision of N.C. Gen. Stat. § 1D-5(4) stating that, punitive damages “shall not be awarded . . . solely for breach of contract.” On this basis, Defendants assert that “[f]raud does not include constructive fraud unless an element of intent is present” and that “an aggravating factor of fraud must be proven ‘by clear and convincing evidence.’” However, contrary to the implication of the Stranges’ argument, there is no *per se* prohibition against the recovery of punitive damages based upon constructive fraud in the relevant statutory language.

A trial court is entitled to submit the issue of punitive damages to the jury upon a showing of constructive fraud. . . . As discussed above, the trial court properly determined that a fiduciary relationship existed and then the jury found that defendant failed to overcome the presumption of fraud by not proving his actions were open, fair and honest. Thus, the issue of punitive damages was properly submitted to the jury.

Melvin v. Home Federal Savings & Loan Ass’n, 125 N.C. App. 660, 665, 482 S.E.2d 6, 8-9 (citing *Bumgarner v. Tomblin*, 92 N.C. App. 571, 576, 375 S.E.2d 520, 523, *disc. review denied*, 324 N.C. 333, 378 S.E.2d 789 (1989), and *Booher v. Frue*, 98 N.C. App. 570, 579, 394 S.E.2d 816, 821, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990)), *disc. rev. denied*, 346 N.C. 281, 487 S.E.2d 551 (1997). “Moreover, in *Compton [v Kirby]*, 157 N.C. App. 1, 577 S.E.2d 905 (2003),] our Court recognized that ‘[p]unitive damages are justified in cases of constructive fraud, N.C. Gen. Stat. § 1D-15(a)(1) (2001), as long as ‘some

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

compensatory damages have been shown with reasonable certainty.’ ” *Babb v. Graham*, 190 N.C. App. 463, 478, 660 S.E.2d 626, 636 (2008) (quoting *Compton*, 157 N.C. App. at 21, 577 S.E.2d at 917 (quoting *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 549, 356 S.E.2d 578, 587 (1987)), *disc. rev. denied*, 360 N.C. 174, 625 S.E.2d 781 (2009).

During her consideration of the Stranges’ objection to the submission of a punitive damages issue to the jury, Judge Eagles stated that:

[TRIAL] COURT: . . . I’m going to deny the motion. I think there’s plenty of evidence to go to the jury on punitive damages[.] . . . [I]f the jury believes the evidence this way, somebody who refused for years to disclose any information about the financial condition of this corporation at all, and then, in the face of some lawyer letters, filed liens against this property . . . when he knew he didn’t have any evidence to support these loans, which is what he testified to. . . . [I]f they believe that, they could find that . . . appalling, and impose some punitive damages on that. And that’s believing his testimony.

We agree with Judge Eagles that the record evidence concerning the Stranges’ conduct, if credited by the jury, would support an award of punitive damages based on clear and convincing evidence that the Stranges intentionally committed a fraudulent act. As a result, we conclude that Judge Eagles did not err by allowing the jury to consider a punitive damages issue.

E. Reimbursement Claims

[5] As we have already noted, Ms. Bogovich’s complaint against the Stranges was predicated, in large measure, on the fact that the Stranges improperly executed and recorded notes and deeds of trust on behalf of Embassy Club securing an alleged liability to themselves in an amount in excess of \$1,300,000.00. In response to the interrogatories inquiring about the “consideration for the indebtedness of [the] Embassy Club” evidenced by the notes and deeds of trust, the Stranges stated that the consideration consisted of “personal loans” made by the Stranges and Anne Strange to Embassy Club, salaries owed to the Stranges, and Mr. Strange’s payment of certain corporate debts. In his deposition and at trial, Mr. Strange reiterated the validity of this assertion.

On 2 April 2009, Judge Balog conducted a nonjury proceeding for the purpose of addressing the Stranges’ reimbursement claims. At that proceeding, Mr. Strange testified that he had made payments on

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

loans owed by Embassy Club, that he had advanced personal funds to Embassy Club, and that he had continued to pay Embassy Club's expenses after the 1976 fire. Mr. Strange stated that he did not receive a salary for his work on behalf of Defendant Embassy Club and that he had never asked Plaintiff Anne Bogovich for authorization to receive a salary or to obtain repayment of the money he claimed to have advanced to the corporation. On cross-examination, Mr. Strange admitted that there were errors in his claims for reimbursement and that he had kept part of the insurance settlement relating to the 1976 fire.

On 22 June 2009, Judge Balog entered an order denying the Strange's reimbursement claims, finding, in pertinent part, that:

(4) Over the course of several years until the latter part of the 1980s [Mr.] Strange advanced substantial sums of money used by the corporation in the operation of the supper club. By a preponderance of the evidence, the amount of money Mr. Strange advanced to the corporation was \$120,220.70.

(5) This money was advanced by Mr. Strange to the corporation without any approval by the corporation.

(6) There were no instruments evidencing any debts to Mr. Strange for any of these alleged loans.

(7) There was no fixed interest rate or payment schedule for any of these alleged loans.

(8) These monies advanced by Mr. Strange to the corporation were used for its business purposes.

(9) There was a total disregard of corporate formalities with regard to corporate meetings and minutes.

(10) Mr. Strange did not receive any formal authorization . . . for these alleged loans. [Ms.] Bogovich was not informed of these advances of money or any details of operation of the supper club.

(11) These advances of monies by Mr. Strange were not shareholder loans and lawful debts of the corporation and this money is not owed to Mr. Strange by the corporation.

(12) Claims that these monies were shareholder loans are also absolutely barred by the applicable statute of limitations.

(13) [The] Strange[s] have asserted claims that the corporation owes them salaries for their time devoted to operation of the supper club.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

(14) There was no agreement by the corporation to pay a salary to [the] Strange[s].

(15) There is no valid claim for salary[.]

(16) Any claims for salary . . . are also barred absolutely by the statute of limitations.

Based on these findings of fact, Judge Balog concluded as a matter of law that:

(2) Monies advanced by Mr. Strange to the corporation are not shareholder loans and lawful debts of the corporation and this money is not owed to Mr. Strange.

(3) Claims for monies advanced to the corporation by Mr. Strange are barred by the statute of limitations.

(4) Claims by [the] Strange[s] for salaries and claims under quantum meruit to recover for time spent on behalf of the corporation are not valid.

(5) Claims by [the] Strange[s] for salaries and claims under quantum meruit to recover for time spent on behalf of the corporation are barred by the statute of limitations.

On appeal, the Stranges challenge Judge Balog's decision to reject their claim for reimbursement on several grounds.

1. Statute of Limitations

First, the Stranges argue that Judge Balog erred by concluding that their reimbursement claims were barred by the applicable statute of limitations. This argument lacks merit.

N.C. Gen. Stat. § 1-15(a) provides that “[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.” The Stranges do not posit any statutory or common law basis for their reimbursement claims or contend that their reimbursement claims sound in contract. As a result, we will assume for purposes of discussion that the Stranges are relying on an implied contract or oral agreement theory in support of their reimbursement claims.

According to N.C. Gen. Stat. § 1-52(1), an action “[u]pon a contract, obligation or liability arising out of a contract, expressed or implied,” must be filed within three years of an alleged breach of that contract.

BOGOVICH v. EMBASSY CLUB OF SEDGFIELD, INC.

[211 N.C. App. 1 (2011)]

However, “where money is lent pursuant to an oral agreement which fails to specify a time for repayment, the repayment is due within a reasonable time. A party must bring an action to recover the repayment within three years after the reasonable time period has passed. In essence, a party has a reasonable time period plus three years in which to bring the action before it is barred by the statute of limitations.” *Phillips & Jordan Investment Corp. v. Ashblue Co.*, 86 N.C. App. 186, 188, 357 S.E.2d 1, 2, *disc. rev. denied*, 320 N.C. 633, 360 S.E.2d 92 (1987).

The Stranges’ reimbursement claims are based on advances made and other obligations that allegedly arose in the 1970s and 1980s. The Stranges have never filed a civil action seeking payment of their claims, even after Ms. Bogovich filed suit against them in 2004. The Stranges do not contend that the more than ten year interval between the last date upon which they provided monies or services to Embassy Club and the date upon which they first mentioned their claim against the corporation constituted a “reasonable time.” Instead, they assert that their reimbursement claims were not time-barred because “the statute of limitations does not run between co-fiduciaries absent demand.” We do not, however, believe that the principle upon which the Stranges rely permits the maintenance of their reimbursement claims.

Admittedly, “ ‘where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until there has been a demand and refusal.’ ” *Glover v. First Union National Bank*, 109 N.C. App. 451, 455, 428 S.E.2d 206, 208 (1993) (quoting *Efird v. Sikes*, 206 N.C. 560, 562, 174 S.E. 513, 513-14 (1934)). Thus, if Ms. Bogovich had agreed that the Stranges would be repaid for monies allegedly advanced to the corporation and paid wages for work performed on behalf of the corporation, the statute of limitations might have been tolled until the Stranges requested reimbursement and Ms. Bogovich rejected that request. For example, in *Fulp v. Fulp*, 264 N.C. 20, 26, 140 S.E.2d 708, 714 (1965), the Supreme Court held that:

Unquestionably, therefore, the statute of limitations began to run against plaintiff’s claim against defendant when . . . she called upon him to perform his agreement . . . and he replied “You don’t think I’m a damn fool, do you?” This was a flat repudiation of his agreement and was notice to plaintiff that he intended to misappropriate the funds which he had received from her through their confidential relationship.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

In this case, however, the Stranges do not claim that an express agreement existed or that Ms. Bogovich refused to honor it. Instead, the Stranges contend that the statute of limitations was tolled until 1998, when Ms. Bogovich sent Mr. Strange what the Stranges characterized as “demand letters.” Although the Stranges do not specifically identify the letters upon which they rely in support of this argument, the record indicates that Ms. Bogovich sent several letters to Mr. Strange seeking information about Embassy Club’s financial status and Mr. Strange’s efforts to sell the corporation’s real property. Ms. Bogovich did not “demand” anything in these letters except to be provided with corporate information to which she was indisputably entitled. In addition, the Stranges never “refused” to provide the requested information; instead, after Ms. Bogovich sent another letter in 2000, Mr. Strange replied that he was “in the process of collecting the [requested] information” and would “contact [Ms. Bogovich’s attorney] when [the collection process had been] completed” on 10 March 2000. The Stranges have failed to explain how this exchange of letters could be construed as a “demand and refusal” that would belatedly trigger the running of the applicable statute of limitations.

Moreover, even if the applicable statute of limitations had been tolled until 1998, the Stranges never asserted a reimbursement claim. In September 2004, the Stranges filed answers to Ms. Bogovich’s interrogatories in which they stated that the challenged instruments were supported by “consideration” in the form of debts allegedly owed to the Stranges. Assuming, without in any way deciding, that these interrogatory responses were the equivalent of asserting a reimbursement claim, the Stranges have made no attempt to establish that the six year interval between 1998 and 2004 constituted a “reasonable” time to wait before seeking reimbursement for monies advanced and services provided in the 1970s and 1980s. Instead, the Stranges argue that the filing of a lawsuit by Ms. Bogovich tolled the limitations period applicable to their reimbursement claims “because no statute of limitations runs against a litigant while his case is pending in court.”

The initial problem with this aspect of the Stranges’ argument is that the claim pending in the judicial system was brought by Ms. Bogovich rather than the Stranges. Moreover, although the Stranges cite several cases in support of their argument:

None of them, however, is applicable to the case at bar. Each involves a plaintiff’s claim against a single defendant before the

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

Industrial Commission and holds that while the plaintiff's claim for compensation is pending before the Commission, no statute of limitations runs against the litigant on that claim.

Bernard v. Ohio Casualty Ins. Co., 79 N.C. App. 306, 308-09, 339 S.E.2d 20, 22 (1986) (citing *Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107 (1975), and *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971)² (other citations omitted). The Stranges have cited no support for the proposition that litigation initiated by a plaintiff tolls the statute of limitations with respect to a defendant's counterclaim, and any such assertion would be contrary to the relevant decisions. See e.g., *State Farm Mut. Auto. Ins. Co. v. Gaylor*, 190 N.C. App. 448, 451, 660 S.E.2d 104, 106 (2008), *disc. rev. denied*, 363 N.C. 130, 676 S.E.2d 310 (2009) (stating that, where the defendants "failed to file their counterclaims within the three-year statute of limitations period," the trial court "did not err when it granted [plaintiff's] motion to dismiss the . . . counterclaims"). Thus, the filing of Ms. Bogovich's complaint does not in any way serve to toll the statute of limitations applicable to any claims asserted by the Stranges.

Finally, the Stranges assert that their "execution of the notes and deeds of trust, instruments under seal, had the effect of preserving these claims for a ten-year period from and after August 10, 2000, the date of their execution." In support of this contention, the Stranges cite N.C. Gen. Stat. § 1-47(2), which prescribes a ten year statute of limitations for actions "[u]pon a sealed instrument." The Stranges have not, however, filed any claims or counterclaims, so that they have not filed a claim or counterclaim "upon a sealed instrument," effectively rendering N.C. Gen. Stat. § 1-47(2) inapplicable to their reimbursement claims.

At bottom, the Stranges' reimbursement claims are based on monies allegedly advanced to Embassy Club and services provided to the corporation in the 1970s and 1980s. The Stranges concede that there is no written contract or express agreement providing for payment of these claims. Moreover, the Stranges do not contend that their reimbursement claims were asserted within a "reasonable time." Instead, the Stranges assert that the applicable statute of limitations was tolled until 1998, when Ms. Bogovich sought corporate information from Mr. Strange. Even if one were to accept this portion of their argument, the record clearly shows that the Stranges have never filed

2. *Giles* and *Watkins* are the two cases cited by the Stranges in support of their argument.

BOGOVICH v. EMBASSY CLUB OF SEDGEFIELD, INC.

[211 N.C. App. 1 (2011)]

a claim or counterclaim seeking reimbursement for these alleged advances and other obligations. Even if we were to treat the discovery responses provided by the Stranges as a “claim,” these responses were not provided until 2004, a six year period which even the Stranges do not claim to have been “reasonable.” The filing of Ms. Bogovich’s civil action against the Stranges did not toll the statute of limitations relating to these reimbursement claims, and N.C. Gen. Stat. § 1-47(2) does not apply in this instance. As a result, we conclude that Judge Balog did not err by concluding that the Stranges’ reimbursement claims were barred by the applicable statute of limitations.

2. Other Reimbursement Claim Issues

In addition, the Stranges argue that their failure to obtain approval for the reimbursement of the alleged advances and for the payments of the value of their services to the corporation does not preclude recovery of their claims on the grounds that “they were fair to the corporation.” As a result, the Stranges contend that Judge Balog erred by ruling that Mr. Strange’s advances to the corporation “were not shareholder loans, were not lawful debts of the corporation, and were not owed back to” Mr. Strange. We do not, however, need to address this facet of the Stranges’ argument in light of our conclusion that their reimbursement claims were barred by the statute of limitations.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of the Stranges’ challenges to Judge Eagles’ and Judge Balog’s decisions have merit and that the Stranges are not entitled to relief on appeal. As a result, the challenged judgments and orders should be, and hereby are, affirmed.

AFFIRMED.

Judges McGEE and STROUD concur.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

GARY LAWRENCE WALKER, PLAINTIFF V. TOWN OF STONEVILLE,
NORTH CAROLINA, DEFENDANT

No. COA10-278

(Filed 19 April 2011)

1. Fraud— negligent misrepresentation—erroneous grant of directed verdict and JNOV

The trial court erred by granting the town's motions for directed verdict and JNOV because plaintiff offered substantial evidence to support the jury's negligent misrepresentation verdict. By inquiring with proper town officials, plaintiff exercised reasonable diligence in attempting to determine how he could return to work with the town without jeopardizing his retirement benefits. Further, plaintiff presented substantial evidence that he justifiably relied on the town's representations.

2. Public Officers and Employees— wrongful discharge—regular employee—payroll method

The trial court erred by directing verdict against plaintiff on his wrongful discharge claim. Plaintiff offered substantial evidence that the town regularly employed 15 or more employees based on the payroll method as required by N.C.G.S. § 143-422.2.

3. Criminal Law— denial of requested instruction—denied opportunity to investigate or could have learned through reasonable diligence

Although defendant contended that the trial court erred by refusing his request to instruct the jury that plaintiff must prove that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence, defendant failed to demonstrate that the trial court's instruction likely misled the jury.

4. Jury— verdict sheet—properly reflected material controversies involved

The trial court did not improperly submit an insufficient verdict sheet to the jury in a negligent misrepresentation case. The issues submitted properly reflected the material controversies involved.

Appeal by Plaintiff from order and judgment entered 25 June 2009 by Judge James M. Webb in Rockingham County Superior Court.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

Cross-appeal by Defendant from order entered 23 March 2009 by Judge John O. Craig, III and order entered 28 May 2009 by Judge James M. Webb in Rockingham County Superior Court. Heard in the Court of Appeals 11 October 2010.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for Plaintiff.

Gray King Chamberlin & Martineau, LLC, by Elizabeth A. Martineau and Susan M. Hill, for Defendant.

STEPHENS, Judge.

This appeal addresses, in its paramount legal issues, the sufficiency of evidence to support a jury verdict in favor of Plaintiff Gary Lawrence Walker (“Plaintiff”) on his negligent misrepresentation claim against Defendant Town of Stoneville (“Defendant” or “Town”) and the statutory construction of the law prohibiting wrongful discrimination in the workplace. But this case involves much more than just these primary legal issues; this case raises, in its essence, issues of competency, trust, accountability, and fundamental fairness.

For the reasons stated below, we hold that the trial court erred in setting aside the jury’s verdict on Plaintiff’s negligent misrepresentation claim and in directing a verdict for Defendant on Plaintiff’s wrongful discharge claim.

I. Procedure

On 19 October 2007, Plaintiff filed this action against the Town for negligent misrepresentation and breach of contract, seeking damages for the loss of Plaintiff’s retirement benefits. Defendant filed an answer on 11 January 2008.

On 18 August 2008, Plaintiff filed a Supplemental and Amended Complaint adding claims for wrongful discharge based on age discrimination. Defendant filed an answer on 19 September 2008 and an amended answer on 25 September 2008.

On 14 January 2009, Defendant filed a motion for summary judgment. By order entered 23 March 2009, following a hearing, the Honorable John O. Craig, III granted Defendant’s motion as to Plaintiff’s contract claims and one of Plaintiff’s wrongful discharge claims, and denied Defendant’s motion as to Plaintiff’s negligent misrepresentation claim and remaining wrongful discharge claim.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

These remaining claims came on for trial before a jury starting 19 May 2009, the Honorable James M. Webb presiding. At the conclusion of Plaintiff's evidence, Defendant made an oral motion for directed verdict on all of Plaintiff's claims. The court granted Defendant's motion on Plaintiff's wrongful discharge claim and took Defendant's motion on Plaintiff's negligent misrepresentation claim under advisement. At the close of all the evidence, Defendant made an oral motion for directed verdict on Plaintiff's negligent misrepresentation claim, which the trial court also took under advisement.

The matter was submitted to the jury. On 28 May 2009, the jury returned a verdict finding Defendant liable for negligent misrepresentation and awarding Plaintiff \$170,008.13 in damages from Defendant. After the jury's verdict was announced, Defendant made an oral motion for judgment notwithstanding the verdict ("JNOV"). The trial court set Defendant's motions for directed verdict and JNOV for hearing during the court's 15 June 2009 civil term.

Defendant's motions were heard on 16 June 2009. At the conclusion of the hearing, the trial court found that the evidence presented at trial was "insufficient to justify a verdict for [] Plaintiff as a matter of law[.]" Thus, by "Order and Judgment" entered 25 June 2009, the trial court allowed Defendant's motion for directed verdict at the close of all the evidence,¹ which the court had taken under advisement before submitting the case to the jury, and Defendant's post-trial motion for JNOV, and entered judgment for Defendant.

Plaintiff filed notice of appeal on 2 July 2009, challenging Judge Webb's 25 June 2009 order and judgment. Defendant filed notice of cross-appeal on 16 July 2009, challenging Judge Craig's 23 March 2009 order and Judge Webb's denial of Defendant's written requests for special jury instructions and issues to be submitted to the jury.

II. Evidence

From 1968 through March 1994, Plaintiff was employed by the Eden Police Department of the City of Eden, North Carolina. Plaintiff started as a patrol officer, and during his 26 years of service, moved through the ranks to ultimately become a lieutenant, supervising seven other police officers. While employed by the City of Eden, Plaintiff was enrolled as a member of the North Carolina Local

1. Although the written order originally allowed "Defendant's Motion for Directed Verdict at the close of Plaintiff's evidence," this language was deleted by Judge Webb.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

Governmental Employees' Retirement System (LGERS),² which is administered by the State Retirement System through local governmental employers such as the City of Eden and the Town of Stoneville. Eden's Finance Officer, Margie Blackstock, enrolled Plaintiff in LGERS when he started working for Eden. Plaintiff received periodic statements from the State Retirement System regarding his retirement account but, otherwise, had no contact with the State Retirement System during his employment.

At age 55, after more than 25 years of service, Plaintiff decided to retire. Because of his age at retirement and his years of service, Plaintiff was entitled to full retirement benefits. Plaintiff talked to Ms. Blackstock, who explained to Plaintiff his rights regarding his retirement benefits and provided Plaintiff with the information he needed to file for retirement. With Ms. Blackstock's assistance, Plaintiff filled out an application for retirement on 10 January 1994 for his retirement benefits to begin in April 1994. Ms. Blackstock sent the application to LGERS. Plaintiff retired 1 April 1994 and began receiving monthly retirement benefits.

Following his retirement, Plaintiff's son, a sergeant with the Town of Stoneville's Police Department, informed Plaintiff that the police department was short-handed and needed some extra help. Plaintiff spoke with Police Chief Garrison and informed her that he was willing to work for the Town as long as his work did not jeopardize his retirement benefits. Chief Garrison referred Plaintiff to the Town's Finance Officer, Amy Winn, who administered LGERS for the Town.

Plaintiff went to see Ms. Winn and told her that he was interested in working for the Town only if he could continue to receive his retirement benefits. Ms. Winn researched some information on her computer and told Plaintiff that he could work for the Town without jeopardizing his retirement benefits as long as three conditions were met: (1) that he not receive regular employee benefits from the Town; (2) that he not be enrolled as an active member of LGERS; and (3) that he not receive compensation exceeding the maximum compensation established yearly by LGERS.

Based on the information he received from Ms. Winn, Plaintiff agreed to work for the Town under the following conditions: (1) Plaintiff received no benefits, *i.e.*, he received no vacation, holiday leave, or other benefits which "regular" employees for the Town

2. LGERS is a division of the Department of State Treasurer, Retirement Systems Division ("State Retirement System").

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

received; (2) Plaintiff was not enrolled in LGERS; and (3) Plaintiff received only the statutory maximum salary provided under N.C. Gen. Stat. § 128-24(5)c (“salary cap”).

Plaintiff initially worked sporadic hours, filling in as needed. Less than a year later, however, Plaintiff was asked to work more regular hours, and Plaintiff assumed a position requiring approximately 42 hours per week. On 5 February 1997, Plaintiff was appointed the Town’s police chief. He served in that position until 3 April 2007. During this time, the Town still considered Plaintiff to be a part-time employee with no benefits.

On a yearly basis, the Town Administrator, Bob Wyatt, and/or the Town Finance Officer, Ms. Winn and later Penny French, would calculate how much Plaintiff could earn during the year under the salary cap and set his salary accordingly. Mr. Wyatt or Ms. Winn would tell Plaintiff what his salary for the upcoming year would be or write Plaintiff’s salary on a note and give it to him. The Town’s budget each year reflected the overall salary of the police chief, which did not exceed the salary cap established by LGERS.

During his years of employment with the Town, Plaintiff was never informed that the North Carolina General Statutes imposed a limitation on the number of hours he could work without affecting his retirement benefits. Specifically, Plaintiff was never informed by the Town that employees who work over 1,000 hours in a year must become members of LGERS, which ends their eligibility for retirement benefits. Mr. Wyatt was unaware of the 1,000-hour rule. Ms. Winn believed that Plaintiff would continue to receive his retirement benefits as long as he stayed under the salary cap, and Ms. Winn never enrolled Plaintiff in LGERS. When Shirley Price took over as the Town Finance Officer on 3 April 1997, Ms. Price was also unaware of the 1,000-hour rule.³

In the fall of 2006, the State Retirement System became aware of the nature of the Town’s compensation arrangement with Plaintiff. Through communications with the Town, the State Retirement System concluded that Plaintiff was working in excess of 1,000 hours per year and, thus, was receiving retirement benefits in violation of the law. Based on that information, the State Retirement System immediately terminated Plaintiff’s eligibility for retirement benefits and informed him that he was required to reimburse LGERS

3. Ms. Price only became aware of the rule when she was deposed in this case.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

\$174,283.37 for the overpayment of retirement benefits. Additionally, the State Retirement System determined that Plaintiff should have been enrolled as a member of LGERS, and that he would be required to pay LGERS the contributions to the retirement system which should have been deducted from his pay.

During the fall of 2006, the Town drafted an “agreement” indicating that it would pay Plaintiff for more than 2,000 hours of work for which he had not been compensated. The Town Council approved the “agreement.” The Mayor of Stoneville signed the document on behalf of the Town, and Plaintiff signed the document as well.⁴ When Plaintiff retained legal counsel, counsel informed the Town that the “agreement” was void for lack of consideration. Plaintiff’s counsel wrote a letter to the Town stating his position that the Town would be liable for any amounts owed by Plaintiff to LGERS.

As a result of the State Retirement System’s decision to terminate Plaintiff’s eligibility for retirement benefits and demand payment from him of \$174,283.37,⁵ the Town enrolled Plaintiff in LGERS and began treating him as a regular employee as of January 2007. Plaintiff continued to serve as the Town’s police chief until 3 April 2007 when the Town demoted him to the position of patrol officer. Plaintiff was 68 years old at the time.

The Town Council meeting minutes of 3 April 2007 reflect that Plaintiff was retiring. However, at no time had Plaintiff given notice of his intent to retire, particularly in light of the LGERS decision to stop his retirement benefits and collect all the money paid to Plaintiff for the prior 12-year period. Plaintiff learned of his demotion from the Town Administrator, Kevin Baughn, the day after the Town Council meeting.

Plaintiff continued to serve as a patrol officer until 10 October 2007, when the Town suspended him without pay due to an alleged issue concerning a credit of sick leave on his time sheet. Plaintiff informed the acting police chief that the credit had been authorized by the Town. The Town asked the State Bureau of Investigation (“SBI”) to investigate. At that time, Mr. Baughn and the police chief informed Plaintiff that if he was cleared in the investigation, he would

4. Plaintiff was not represented by counsel at this point.

5. Plaintiff contested the State Retirement System’s position. Although this Court was “very distressed and troubled that [Plaintiff] must reimburse the retirement benefits paid to him by [the State Retirement System,]” ultimately, this Court affirmed the State Retirement System’s decision. *Walker v. Dep’t of State Treasurer*, — N.C. App. —, —, — S.E.2d —, — (2010).

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

be reinstated with back pay. Although Plaintiff was cleared by the SBI inquiry, he remained on suspension without pay. In February 2008, Plaintiff received a letter informing him that his employment with the Town was terminated, effective 6 February 2008.

*III. Discussion**A. Plaintiff's Claims**1. Negligent Misrepresentation*

[1] Plaintiff first argues that the trial court erred in granting the Town's motions for directed verdict and JNOV because Plaintiff offered substantial evidence to support the jury's negligent misrepresentation verdict in his favor. We agree.

The question presented by the Town's directed verdict motion is whether the evidence, considered in the light most favorable to Plaintiff, is sufficient to take the case to the jury and to support a verdict for Plaintiff. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984). If there is more than a scintilla of evidence "to support [Plaintiff's] *prima facie* case in all its constituent elements[.]" the motion for directed verdict should be denied. *Douglas v. Doub*, 95 N.C. App. 505, 511, 383 S.E.2d 423, 426 (1989). A JNOV motion is "essentially a renewal of a motion for directed verdict[.]" *Smith v. Price*, 74 N.C. App. 413, 418, 328 S.E.2d 811, 815 (1985), *aff'd in part, rev'd in part on other grounds*, 315 N.C. 523, 340 S.E.2d 408 (1986). On appeal, we apply the same standard of review as we employ to review a directed verdict motion. *N. Nat'l Life Ins. Co. v. Lacy J. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984).

"North Carolina expressly recognizes a cause of action in negligence based on negligent misrepresentation." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 483, 593 S.E.2d 595, 600 (citation and quotation marks omitted), *disc. review denied*, 358 N.C. 543, 579 S.E.2d 48 (2004). "It has long been held in North Carolina that '[t]he tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.'" *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (*quoting Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 18 (2001).

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

The Town concedes that “there is no doubt that [it] had a duty toward Plaintiff with regard to providing [P]laintiff accurate information regarding his questions about the State Retirement System[.]” It is also not in dispute that Plaintiff did not receive accurate information from the Town concerning the conditions under which Plaintiff could work for the Town without jeopardizing his retirement benefits. Moreover, as a result of Plaintiff’s reliance on the information he received from the Town, Plaintiff (1) worked full-time for approximately 12 years for a salary which was well below the reasonable and customary pay received by police officers in North Carolina, (2) is required to reimburse the State Retirement System \$174,283.37 for benefits wrongfully paid to him, (3) is required to make contributions to the LGERS system for all the years he was not enrolled in the system, and (4) has been embroiled in this legal battle since 2006. It is thus unassailable that Plaintiff’s reliance on the information was to his detriment. Accordingly, the contested issue on appeal concerning Plaintiff’s negligent misrepresentation claim is whether Plaintiff offered sufficient evidence of justifiable reliance.

Justifiable reliance requires actual reliance. *Raritan*, 322 N.C. at 206, 367 S.E.2d at 612. North Carolina’s Pattern Jury Instructions instruct that “[a]ctual reliance is direct reliance upon false information.” N.C.P.I.—Civil 800.10 (1992). Moreover, “the ‘question of justifiable reliance is analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether plaintiff reasonably relied upon the representations made by defendant.’” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P.*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999) (quoting *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622, *disc. rev. denied*, 301 N.C. 95, — S.E.2d — (1980)); see also *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544, 356 S.E.2d 578, 584 (1987) (“Ordinarily, the question of whether an actor is reasonable in relying on the representations of another is a matter for the finder of fact.”). “What is reasonable is, as in other cases of negligence, dependent upon the circumstances.” *Marcus Bros. Textiles*, 350 N.C. at 225, 513 S.E.2d at 327 (citation and quotation marks omitted).

The evidence presented at trial concerning the reasonableness of Plaintiff’s reliance on the information he received from the Town, viewed in the light most favorable to Plaintiff, tended to show the following: The Local Governmental Employees’ Retirement System Employer Manual, distributed by the North Carolina Department of State Treasurer to the Town, as a local governmental unit and

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

employer, states that “[i]t is the responsibility of the employer to ensure that all eligible members are reported to the LGERS, as required by State law, and to remit monthly contributions in an accurate and timely manner.” (Emphasis added). The Manual further “advises all personnel and payroll offices to contact LGERS when they are in doubt about a specific question or set of circumstances.” Gary Austin, the Special Assistant to the Senior Deputy Director of the State Retirement System, testified that, as a general rule, all communications initiated by LGERS to employees are conveyed through the employer.⁶ Furthermore, until 2006, only the employer could access LGERS information via computer.

The Town, through its Finance Officer, administered LGERS for the Town and its employees. Consistent with this responsibility, the Finance Officer enrolled employees in the system, prepared necessary forms for the system, and provided manuals and pamphlets to employees and retirees. With respect to retirees, the only interactions initiated by LGERS after retirement were to send the retiree a pamphlet, which Plaintiff did not recall receiving, and his or her monthly check.

Plaintiff had relied on the City of Eden’s Finance Officer, Ms. Blackstock, to enroll him in LGERS when he began to work for Eden in 1967 and to assist him in applying for retirement benefits when he retired in 1994. During his 26-year career with the City of Eden, Plaintiff had no interaction with LGERS, except for receiving periodic statements of his retirement account.

When Plaintiff was recruited to work for the Town, he was referred to the Town Finance Officer, Ms. Winn, to determine if he could work for the Town without jeopardizing his retirement benefits. Ms. Winn looked up some information on her computer and told Plaintiff that he could work for the Town if he met the following conditions: (1) that he receive no benefits, *i.e.*, no vacation, holiday leave, or other benefits which “regular” employees for the Town received; (2) that he *not* be enrolled in LGERS; and (3) that he receive only the statutory maximum salary provided under the salary cap. Ms. Winn did not inform Plaintiff of any restriction on the number of hours he could work to avoid affecting his retirement benefits.

Based on Ms. Winn’s information, Plaintiff commenced work for the Town (1) without benefits; (2) without becoming a member of LGERS; and (3) while receiving a salary which did not exceed the salary cap. Each year thereafter, several months prior to the end of the

6. It was not until 2008 that LGERS initiated direct mailings to employees.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

year, the Town would calculate how much Plaintiff could earn in the upcoming year under the salary cap and set Plaintiff's salary accordingly. The Town relayed this salary information to Plaintiff either in a meeting or by giving him a slip of paper with his salary stated thereon. Plaintiff worked for the Town from 1996 through 2007, during which time Plaintiff continued to comply with the above-stated conditions in order not to jeopardize his retirement benefits. We conclude that these actions evidence Plaintiff's actual reliance on the Town's advice.

The Town argues, however, that Plaintiff began to receive sick benefits, in contravention of the first requirement that he not receive benefits, and, thus, Plaintiff failed to actually rely on Ms. Winn's representations. We disagree.

Regular full-time employees of the Town receive the following employment benefits: vacation pay, holiday pay, sick leave, health care insurance, life insurance, the opportunity to participate in the Town's 401(k) plan, and enrollment in the State Retirement System. It is undisputed that from 1994 through 2006, Plaintiff did not receive vacation pay, holiday pay, or life insurance; did not have the opportunity to invest in the Town's 401(k) plan; and was not enrolled in LGERS.

Around the end of 1999, Plaintiff became concerned that his heart condition would require treatment and cause him to miss work. He approached Bob Wyatt, Town Administrator, and asked if he could receive compensated leave time if he needed to miss work. Mr. Wyatt approached the Town Council and, after obtaining approval from the Council, instructed Plaintiff to record eight hours each month on his time sheets to cover any absence from work due to sickness. These hours were logged in a record of compensatory time maintained by the Finance Officer.

It is evident that Plaintiff began his employment without any "regular" benefits and was attempting to comply with the requirement by asking Mr. Wyatt how he might be able to receive compensated leave time. Furthermore, it is evident from the process by which Mr. Wyatt and the Town Council approved Plaintiff's compensatory time that the Town was also attempting to comply with this requirement and did not consider Plaintiff a regular, full-time employee after the compensatory time was approved. We thus conclude that Plaintiff's actions evidence actual reliance on the Town's advice.⁷

7. Moreover, to the extent that the Town's approval of compensated leave time constituted grounds for Plaintiff's disqualification for his retirement benefits, such advice could arguably constitute further negligent misrepresentation by the Town.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

Defendant nonetheless argues that Plaintiff offered insufficient evidence that Plaintiff's reliance was reasonable because he failed to show he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence. In essence, the Town argues that it was Plaintiff's duty to investigate—that is, to doubt the Town's veracity and ascertain the facts for himself. We categorically reject the Town's contention.

"[A]man is not expected to deal with another as if he is a knave, and certainly not unless there is something to excite his suspicion." *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 8, 76 S.E. 634, 637 (1912). Where the parties are not on equal footing, and the defendant who possesses superior knowledge and/or experience makes a representation "containing nothing so improbable or unreasonable as to put the other party upon further inquiry or give him cause to suspect that it is false, and an investigation would be necessary for him to discover the truth, the statement may be relied on." *Id.* (citation and quotation marks omitted).⁸ If, in such an instance, the plaintiff who relies on the false or misleading representation is injured, the defendant "will not be heard to say that he is a person unworthy of belief and that plaintiff ought not to have trusted him, or that plaintiff was negligent and was cheated through his own credulity." *White Sewing Machine*, 161 N.C. at 8, 76 S.E.2d at 637 (citation and quotation marks omitted).

In this case, Plaintiff and the Town were not on equal footing. The Town, which was in a position of authority and was responsible for enrolling Plaintiff in LGERS if he qualified, possessed superior knowledge and experience with LGERS than Plaintiff and possessed superior access to printed and electronic material concerning LGERS than Plaintiff. Moreover, there was nothing in the Town's initial representation to Plaintiff, through Ms. Winn, or the Town's subsequent representations to Plaintiff regarding his yearly salary,⁹ that would put a person of ordinary prudence upon inquiry. Plaintiff understood

8. Cf. *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 699-700, 303 S.E.2d 565, 569 ("A purchaser *who is on equal footing* with the vendor and has equal means of knowing the truth is contributorily negligent if he relies on a vendor's statements regarding the physical condition of property.") (emphasis added), *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

9. Although the Town argues that Ms. Winn's initial representation was not "false" since Plaintiff was not working more than 1,000 hours at the time she gave him the information, such argument is irrelevant, at best, where the Town continued to represent to Plaintiff that he could receive his retirement benefits if his salary was below the salary cap even after Plaintiff's hours exceeded 1,000.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

that the Town was cognizant of the facts and rules concerning his employment, and Plaintiff relied upon the Town's positive and unequivocal statements. There was absolutely nothing to arouse Plaintiff's suspicion or to induce him to believe that the Town did not know the truth. Accordingly, Plaintiff presented sufficient evidence upon which a jury could conclude that his reliance upon the Town's advice was reasonable.

Citing *Eastway Wrecker Serv. v. City of Charlotte*, 165 N.C. App. 639, 645, 599 S.E.2d 410, 414 (2004), *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005), the Town argues further that when the party relying on a false or misleading representation could have discovered the truth upon inquiry, that party must show that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.

In response, Plaintiff argues that this requirement has only been applied in commercial settings involving real estate or business and that, in contrast to a commercial arms-length transaction, Plaintiff had every reason to trust the Town Finance Officer who was charged with the duty to inform him of the requirements of the retirement system. However, we need not determine whether Plaintiff was *required* to show that he was denied the opportunity to investigate, or that he could not have learned the true facts by exercise of reasonable diligence, because we conclude that the evidence was sufficient to show that Plaintiff could not have learned the true facts by exercise of reasonable diligence.

As discussed *supra*, the Town possessed superior knowledge and experience with LGERS than Plaintiff, possessed superior access to printed and electronic material concerning LGERS than Plaintiff, and was advised by LGERS "to contact the LGERS when they are in doubt about a specific question or set of circumstances." Even in the Town's superior position, however, the Town did not determine *for 12 years* that Plaintiff's benefits were subject to termination if he worked more than 1,000 hours. Accordingly, it cannot reasonably be asserted that Plaintiff would have discovered that his retirement benefits were subject to termination if he worked more than 1,000 hours, had he made further reasonable inquiry into the matter.

Given the Town's position of authority and its superior knowledge and experience with LGERS, Plaintiff had every reason to trust the Town's advice concerning the requirements of LGERS. Thus, by inquiring with proper Town officials, Plaintiff *did* exercise reason-

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

able diligence in attempting to determine how he could return to work with the Town without jeopardizing his retirement benefits. Plaintiff was not required to distrust the Town's information and make a separate inquiry into the specifics of North Carolina's retirement statutes. Accordingly, Plaintiff presented substantial evidence that he justifiably relied on the Town's misrepresentations.

We thus conclude that Plaintiff presented substantial evidence to support the jury's verdict on his negligent misrepresentation claim, and the trial court erred in granting Defendant's motion for directed verdict and JNOV. The trial court's order on this issue is reversed, the trial court's judgment entered in favor of Defendant is vacated, and the jury verdict is reinstated.

In light of our holding, the Town's argument on its cross-appeal, contending that the trial court erred in failing to grant the Town summary judgment on this issue, is overruled.

2. Wrongful Discharge

[2] Plaintiff next argues that the trial court erred in directing a verdict against him on his wrongful discharge claim. Specifically, Plaintiff argues that he offered substantial evidence that the Town "regularly employ[ed] 15 or more employees," as required by N.C. Gen. Stat. § 143-422.2. We agree.

The North Carolina legislature has declared that "[i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees." N.C. Gen. Stat. § 143-422.2 (2009).

At issue is the interpretation to be accorded the statutory term "regularly employ[.]" "[T]he plain language of this statute provides no guidance concerning the requisite elements to establish the *prima facie* case of a claim under it." *Newton v. Lat Purser & Assocs.*, 843 F. Supp. 1022, 1025 (W.D.N.C. 1994). Moreover, we know of no North Carolina court decision directly construing the term "regularly employ" as applicable under this statute. We thus "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dept. of Corr. v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983); *see also Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 685-86, 504 S.E.2d 580, 584 (1998), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999).

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

Similar to N.C. Gen. Stat. § 143-422.2, Title VII of the Civil Rights Act prohibits an employer “who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year” from discriminating against an employee on the basis of “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e (2005). To count an individual as an “employee” under section 2000e(b), “all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and if so, when. He is counted as an employee for each working day after arrival and before departure.” *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 211, 136 L. Ed. 2d 644, 654 (1997). “Whether the employee is actually working or receiving pay for each day is irrelevant, so long as he or she appears on the company payroll.” *Russell v. Buchanan*, 129 N.C. App. 519, 522, 500 S.E.2d 728, 730, *disc. review denied*, 348 N.C. 501, 510 S.E.2d 655 (1998). Thus, under this so-called “payroll method,” if 15 or more individuals appear on the employer’s payroll for 20 or more weeks during the year, the employer is governed by Title VII. *Metro. Educ. Enters.*, 519 U.S. at 211, 136 L. Ed. 2d at 654.

The “payroll method” has also been adopted by the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act of 1967, which, like Title VII, applies to an “employer” “who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]” *See* 29 U.S.C. § 630(b) (2009); Equal Employment Opportunity Commission Policy Guidance No: N-915-052, “Whether Part-Time Employees Are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA,” (Apr. 20, 1990).¹⁰

“The ultimate purpose of . . . [N.C. Gen. Stat. §] 143-422.2, and Title VII . . . is the same; that is, the elimination of discriminatory practices in employment.” *Gibson*, 308 N.C. at 141, 301 S.E.2d at 85. Accordingly, we find the language of Title VII, and the principles of law applied to claims arising under Title VII, to be instructive here. We conclude that an employer regularly employs 15 or more employees, and is thus governed by N.C. Gen. Stat. § 143-422.2, when 15 or more employees appear on the employer’s payroll each working day during

10. The Department of Labor has likewise adopted the “payroll method” under the Family and Medical Leave Act of 1993, which defines an “employer” as a company who “employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.” *See* 29 U.S.C. § 2611(4)(A)(I) (2009); 29 CFR § 825.105(b)-(d) (2009).

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

each of 20 or more calendar work weeks in the current or preceding calendar year.

The Town argues, however, that an employee must work for a minimum of 1,000 hours per year to be considered “regularly employed” under N.C. Gen. Stat. § 143-422.2. In support of its position, the Town first relies on Title 20. Department of State, Chapter 2. Retirement Systems, Subchapter 2C. Local Governmental Employees’ Retirement System, Section .0800 Membership, Subsection .0802 Regularly Employed, of the North Carolina Administrative Code which states, “An officer or employee [who] is in a regular position, the duties of which require not less than 1,000 hours of service per year[,] shall be an employee as defined in N.C. Gen. Stat. § 128-21(10).” However, because N.C. Gen. Stat. § 128-21(10) defines an “employee” solely for the purposes of the North Carolina Local Governmental Employees’ Retirement System, we conclude that the Town’s reliance is misplaced. As N.C. Gen. Stat. § 143-422.2 and the public policy prohibiting discrimination by an employer in the workplace are wholly unrelated to N.C. Gen. Stat. § 128 *et. seq.* and the relevant administrative regulations governing the North Carolina Local Governmental Employees’ Retirement System, the Town’s argument is unavailing.

The Town also cites for support of its position *Patterson v. L. M. Parker & Co.*, 2 N.C. App. 43, 162 S.E.2d 571 (1968), a workers’ compensation case in which this Court stated that “the term ‘regularly employed’ connotes employment of the same number of persons throughout the period with some constancy.” *Id.* at 48-49, 162 S.E.2d at 575. While the term “regularly employ” as used in N.C. Gen. Stat. § 143-422.2 similarly connotes employment of the same number of persons throughout the period with some constancy, such constancy does not require employees to work at least 1,000 hours. Instead, as we have already concluded, constancy of employment is evidenced by the requisite number of individuals appearing on the employer’s payroll each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.

At trial, Shirley Price, Finance Officer for the Town starting in 2007, testified, based on forms submitted by the Town to the Employment Security Commission, that “the number of covered workers who worked during or received pay for the payroll period” for the first three quarters of 2007¹¹ and the first quarter of 2008 was as follows:

11. Ms. Price testified that the fourth quarter records for 2007 were not available.

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

2007

first quarter:

first month, 19 employees

second month, 20 employees

third month, 18 employees

second quarter:

first month, 47 employees

second month, 41 employees

third month, 48 employees

third quarter:

first month, 11 employees

second month, 20 employees

third month, 20 employees

2008

first quarter:

first month, 21 employees

second month, 21 employees

third month, 23 employees

While the Town argues that these numbers include many employees who did not work at least 1,000 hours, the Town does not contest that this evidence was sufficient to show that the Town regularly employed 15 or more employees based on the “payroll method.” We conclude that the evidence was sufficient to establish that the Town “regularly employ[ed] 15 or more employees[.]” N.C. Gen. Stat. § 143-422.2. Accordingly, the trial court erred in directing a verdict against Plaintiff on this issue, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

Based on our holding, the Town’s argument on its cross-appeal, contending that the trial court erred in failing to grant the Town summary judgment on this issue, is overruled.

*B. Defendant’s Claims**1. Jury Instruction*

[3] Defendant contends that the trial court erred by refusing Defendant’s request to instruct the jury that Plaintiff *must* prove that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence. We disagree.

To prevail on this issue, Defendant must demonstrate that “(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, consid-

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

ered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.” *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (*citing Faeber v. E. C. T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972) (upholding instruction on grounds that it “sufficiently covered the meaning of the terms” that defendant requested trial court to define in its charge to jury)), *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). When a request is made for a specific jury instruction that is correct as a matter of law and is supported by the evidence, the trial court is required to give an instruction expressing “at least the substance of the requested instruction[.]” *Parker v. Barefoot*, 130 N.C. App. 18, 20, 502 S.E.2d 42, 44 (1998), *rev’d on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999). On appeal, this Court “must consider and review the challenged instructions in their entirety; it cannot dissect and examine them in fragment” in order to determine if the court’s instruction provided “the substance of the instruction requested[.]” *Id.*

The trial court instructed the jury with respect to the element of justifiable reliance as follows:

[T]hat Plaintiff actually relied on the false information supplied by the Defendant and that the Plaintiff’s reliance was justifiable. Actual reliance is direct reliance upon false information. Reliance is justifiable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care, would have relied on the false information and/or would not have discovered the information was false. *In this case, Plaintiff’s reliance may be justified if Plaintiff could not have discovered the truth about the Local Governmental Employees’ Retirement System rules by the exercise of reasonable diligence or if the Plaintiff was induced by the Defendant to forego additional investigation to learn about those rules.*

(Emphasis added). The Town’s proposed jury instruction differed from the emphasized language as follows:

In this case, Plaintiff’s reliance would be justified *only* if Plaintiff could not have discovered the truth about the State Retirement System rules about re-employment after retirement by the exercise of reasonable diligence or if the Plaintiff was induced by the Town of Stoneville to forego additional investigations to learn about the State Retirement System’s rules regarding re-employment after retirement.

(Emphasis added).

WALKER v. TOWN OF STONEVILLE

[211 N.C. App. 24 (2011)]

The Town argues that the trial court's failure to instruct the jury as proposed by the Town misled the jury because the instruction allowed the jury to find justifiable reliance "even if Plaintiff could have discovered the truth through reasonable diligence."

We need not determine whether the Town's proffered instruction was a correct statement of the law because we conclude that Defendant has failed to demonstrate that the trial court's instruction "likely misled the jury[.]" As explained *supra*, Plaintiff could not have discovered the truth about the Local Governmental Employees' Retirement System rules by the exercise of reasonable diligence. Defendant's argument is overruled.

2. Submission of Issues

[4] The Town finally argues that the trial court submitted an insufficient verdict sheet to the jury. Specifically, the Town argues that the verdict sheet did not inquire into whether Plaintiff justifiably relied upon the Town's representations.

"[T]he trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence." *Rental Towel & Uniform Serv. v. Bynum Int'l, Inc.*, 304 N.C. 174, 176, 282 S.E.2d 426, 428 (1981). " 'The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.' " *Griffis v. Lazarovich*, 161 N.C. App. 434, 440, 588 S.E.2d 918, 923 (2003) (*quoting Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967)), *disc. review denied*, 358 N.C. 375, 598 S.E.2d 135 (2004). Further, N.C. R. Civ. P. 49(b) provides that "issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." N.C. Gen. Stat. § 1A-1, Rule 49(b) (2009).

The Town proposed that the following issues be presented to the jury:

Did the Plaintiff justifiably rely on a negligent misrepresentation made by the Defendant?

Did such reliance cause him financial damage?

What amount, if any, is the Plaintiff entitled to recover from the Defendant?

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

The trial court submitted the following issues to the jury:

1. Was the plaintiff financially damaged by a negligent misrepresentation of the Defendant?
2. What amount is the Plaintiff entitled to recover from the defendant for negligent misrepresentation?

The issues submitted to the jury properly reflect the “material controversies” involved in this negligent misrepresentation action. *Uniform Serv.*, 304 N.C. at 176, 282 S.E.2d at 428. The trial court did not abuse its discretion by failing to submit one element of negligent misrepresentation as a separate issue or by combining the elements of the offense of negligent misrepresentation into one issue. *Griffis*, 161 N.C. App. at 440-41, 588 S.E.2d at 923. We conclude that the issues as presented allowed the jury to render judgment fully determining the cause. *Chalmers*, 269 N.C. at 435-36, 152 S.E.2d at 507. This argument is overruled.

For the reasons stated, the order and judgment of the trial court are

REVERSED in part, and REVERSED and REMANDED in part.

Chief Judge MARTIN and Judge STROUD concur.

TERRY CAWTHORN, EMPLOYEE, PLAINTIFF V. MISSION HOSPITAL, INC., SELF-INSURED
EMPLOYER, DEFENDANT

No. COA10-748

(Filed 19 April 2011)

**1. Workers’ Compensation— temporary total disability—
incurred and future medical treatment**

The Industrial Commission did not err in a workers’ compensation case by awarding ongoing temporary total disability benefits and all incurred and future medical treatment. The evidence supported a doctor’s opinion that plaintiff’s condition necessitating her surgery and causing her disability was the direct result of her 26 February injury and the three subsequent work-related aggravations.

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

2. Attorney Fees—workers' compensation—stubborn unfounded litigiousness

The Industrial Commission erred in a workers' compensation case by finding that the defense of this claim was reasonable and not stubborn, unfounded litigiousness where the findings of fact and conclusions of law ignored certain evidence and declined to award attorney fees under N.C.G.S. § 97-88.1. The case was remanded for a determination of the amount of attorney fees.

Appeal by Plaintiff and cross-appeal by Defendant from opinion and award entered 25 March 2010 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2010.

Ganly & Ramer, PLLC, by Thomas F. Ramer, for Plaintiff-Appellant.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Ginny P. Lanier, for Defendant-Appellee/Cross-Appellant.

BEASLEY, Judge.

Terry Cawthorn (Plaintiff) and Mission Hospital, Inc. (Defendant) both appeal from the Commission's opinion and award entitling Plaintiff to ongoing temporary total disability compensation and payment of related medical treatment, and finding Defendant did not deny Plaintiff's claim or defend the action without reasonable grounds. For the following reasons, we affirm the Commission's award of benefits but reverse its finding that Defendant acted reasonably in defending the claim and remand for a determination of attorney's fees under N.C. Gen. Stat. § 97-88.1.

On 20 October 2008, Plaintiff filed a Form 18 alleging that she sustained a specific traumatic incident, causing injury to her low back, while performing a post-surgical patient transfer in the course of her employment. Defendant denied the claim on the grounds that no specific traumatic event occurred and medical evidence failed to support a conclusion that Plaintiff's condition was caused by any work-related accident. Plaintiff thereafter requested a hearing seeking payment of compensation for days missed and medical expenses, and an assessment of attorney's fees under N.C. Gen. Stat. § 97-88.1 for Defendant's allegedly unfounded litigiousness. Defendant appealed the deputy commissioner's opinion and award finding Plaintiff suffered a compensable injury and that the denial of her claim was

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

unreasonable. The Commission reviewed the case and entered an opinion and award on 25 March 2010, affirming the deputy commissioner's award of temporary total disability compensation in large part but concluding that the defense of Plaintiff's claim was reasonable and rejecting any assessment of attorney's fees under § 97-88.1.

The Commission's findings of fact indicate that Plaintiff had worked for Defendant as a registered nurse for over twenty years and was regularly assigned to the women's operating room. On 26 February 2008, Plaintiff was asked to assist in post-surgical recovery and transport in a different department. As she helped transfer a patient from the gurney to the bed, Plaintiff felt a pain in her back, which continually increased throughout the evening. She reported the back injury to her supervisor, Beverly Caraway, the next morning and was instructed to go to Staff Health after completing an injury report on Defendant's computerized system, "RiskMaster." Plaintiff reported the claim as a workplace injury caused by moving a patient, which became worse during the last hour of her shift. Defendant's risk management staff reported that the claim fell under the "Workers' Comp SIR" insurance policy and listed the type of claim as "Medical Only." Plaintiff then saw Joshua Klaaren, a Staff Health physician's assistant, for a scheduled workers' compensation evaluation. He diagnosed Plaintiff with a low back and SI joint strain and restricted her to light duty work for two days. Ms. Caraway advised her supervisors, Samantha Farmer and Renee Carpenter, of Plaintiff's injury and work restrictions.

Despite remaining on restricted duty, Plaintiff re-injured her back on three subsequent occasions while conducting work-related tasks. After two subsequent lifting incidents on 7 March and 10 March 2008, Plaintiff was instructed to go to Staff Health, where she described low back pain, SI joint pain, and secondary spasms. Defendant had scheduled and reported the visit as a follow-up workers' compensation evaluation for Plaintiff's 26 February 2008 injury; thus, Mr. Klaaren believed that Defendant considered Plaintiff's condition to be related to that initial injury. On 11 April 2008, Plaintiff returned to Staff Health after informing Ms. Carpenter that the two occasions of re-aggravation had caused her condition to worsen. She described her continued right SI joint pain to Dr. Paul Martin, who noted Plaintiff's injury occurred on 26 February 2008 and was work-related. Dr. Martin sent Ms. Carpenter a follow-up email advising her of Plaintiff's continuing SI joint pain since 26 February. Following a third subsequent lifting incident on 20 May 2008, Plaintiff was again

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

directed to Staff Health, and Defendant's records likewise reported the visit as a scheduled, follow-up evaluation of Plaintiff's 26 February injury. The physician's assistant noted Plaintiff's discomfort over her bilateral sacral area, placed her on restricted duty, and recommended to Defendant's workers' compensation administrator, Mary Silver, that Plaintiff be authorized to see Dr. Daniel Hankley, a physical medicine and rehabilitation specialist.

At that point, Defendant's adjuster, Janet Mikos, became aware of Plaintiff's claim and interviewed her regarding the injury. During their 27 May 2008 conversation, Ms. Mikos advised Plaintiff that because neither she nor the patient she was assisting slipped, tripped, or fell, the 26 February incident did not qualify for workers' compensation coverage.

On 30 May 2008, Plaintiff was seen by Dr. Hankley, who stated that she aggravated her SI joint during the lifting and patient-assisting movements she had described and indicated that Plaintiff might have some referred pain from her L5-S1 disc. Nevertheless, Defendant denied Plaintiff's claim by letter dated 4 June 2008. On 12 June 2008, after continuing to have low back and bilateral SI joint pain, Plaintiff returned to Dr. Hankley, who observed more low back pain and right SI joint pain. He also noted Plaintiff's report of back pain and spasms from lifting a casserole out of the oven that were so severe she had to lie on the floor. Dr. Hankley's diagnosis and the restrictions he imposed remained unchanged. Plaintiff's pain, however, never resolved and she began to notice trouble with her left thigh at the end of June.

Neurosurgeon Dr. Ralph Loomis evaluated Plaintiff on 16 July 2008 and reported diffuse weakness in her left leg. Upon review of Plaintiff's MRI, Dr. Loomis diagnosed spondylolisthesis at L5-S1, lumbar stenosis and foraminal stenosis, low back pain, left leg weakness, and radiculopathy. Even after a nerve root block provided significant relief of Plaintiff's symptoms, she continued to work on light duty. On 9 September 2008, however, Defendant notified Plaintiff that light duty work was no longer being made available to her, and she was taken out of work as of that date. Plaintiff saw Dr. Loomis for a follow-up examination on 16 September 2008. His diagnosis remained unchanged, and Plaintiff was evaluated for a second opinion by Dr. Jon Silver on 22 October 2008. Dr. Silver noted the lifting injury aggravated the spondylolisthesis and opined that Plaintiff was incapable of performing her duties as a nurse for Defendant, opinions with which Dr. Loomis agreed. Dr. Silver thereafter referred Plaintiff to Dr.

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

Margaret Burke to undergo rehabilitation to try to avoid a surgical fusion, but on 1 December 2008, Dr. Loomis performed a lumbar interbody fusion at L5-S1. Defendant terminated Plaintiff on 3 December 2008.

Following surgery, Plaintiff continued under the care of Drs. Loomis and Burke, who indicated follow-up treatment and a functional capacity evaluation were required to determine her safe working limitations. Dr. Burke, however, stated that it would be months before Plaintiff would be released at maximum medical improvement. The Commission found that “Plaintiff has been and continues to be disabled from any employment” and concluded such was caused by “a specific traumatic incident of the work assigned on February 26, 2008, which was aggravated by [three later incidents] arising out of and in the course of her employment with [Defendant]” and resulted in injury to her low back. Defendant was required to pay ongoing temporary total disability compensation at a rate of \$786.00 per week from 10 September 2008 until Plaintiff returns to work or further order of the Commission. The opinion and award also entitled Plaintiff to payment by Defendant for all related medical treatment related to the 26 February incident and resulting physical injuries and to attorney’s fees under N.C. Gen. Stat. § 97-88, but not under § 97-88.1. Both parties gave timely notice of appeal.

Defendant’s Appeal

[1] Defendant argues for reversal of the Commission’s decision to award ongoing indemnity benefits and future medical treatment, contending “that the competent evidence demonstrates that [P]laintiff’s current condition, need for surgery, and resulting disability, is due to the non-work related casserole lifting event and that, but for this incident, [P]laintiff would be capable of engaging in gainful employment and would not require surgical intervention and future medical treatment.”

On appeal from an opinion and award of the Commission, our task is “limited to reviewing whether any competent evidence supports the Commission’s findings of fact and whether the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). “The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (internal quotation marks omitted). Where our “duty goes no further than to determine whether the record contains any evidence tending to support the finding,” this

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

Court “does not have the right to weigh the evidence and decide the issue on the basis of its weight.” *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (internal quotation marks and citations omitted). However, conclusions of law are reviewed *de novo*. *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

The Commission’s award of disability benefits was based, in part, on expert testimony that Plaintiff’s 26 February 2008 lifting injury aggravated her pre-existing spondylolisthesis and that the three subsequent incidents on 7 March, 10 March, and 20 May 2008, further aggravated her condition to a point necessitating surgical intervention. While acknowledging that issues of credibility are left to the Commission, Defendant argues that the Commission erred in affording greater weight to the opinions of Drs. Loomis, Silver, and Burke—and less to Dr. Hankley—because the former are not supported by any competent evidence. Defendant continues that the only competent evidence demonstrates that Plaintiff’s left-sided symptoms and radicular pain in her lower extremities were unrelated to her work injuries but, rather, were the direct result of the intervening casserole-lifting event. We disagree.

Where an injury is compensable only if it is one “arising out of and in the course of the employment,” N.C. Gen. Stat. § 97-2(6) (2009), “the term ‘arising out of’ refers to the origin or causal connection of the accidental injury to the employment.” *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 532 (1977).

A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. As long as the primary injury is shown to have arisen out of and in the course of employment, then every natural consequence flowing from that injury likewise arises out of the employment. The subsequent injury is not compensable if it is the result of an independent, intervening cause.

Nale v. Ethan Allen, 199 N.C. App. 511, 515, 682 S.E.2d 231, 235 (2009) (internal quotation marks and citations omitted). Still, “the employment-related accident need not be the sole causative force to render an injury compensable” so long as competent evidence proves it to be a “causal factor.” *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotation marks and citations omitted); *see also Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 466, 470 S.E.2d 357, 359 (1996) (“If the work-related accident ‘contributed in some reasonable degree’ to plaintiff’s disability, she is entitled to compensation.”). Moreover, the aggravation of a preexist-

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

ing condition which results in loss of wage earning capacity is compensable. See *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) (holding work-related specific traumatic incident aggravating the plaintiff's severe preexisting back problems was a compensable injury). While Plaintiff bears the burden of proving causation by a preponderance of the evidence, if *any* competent evidence supports the Commission's findings of fact, we must accept them as true, *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 318, 636 S.E.2d 824, 827 (2006), even if some evidence would support contrary findings, *Deese*, 352 N.C. at 115, 530 S.E.2d at 552-53.

Evidence "tending to show a proximate causal relation" is competent if it "take[s] the case out of the realm of conjecture and remote possibility[.]" *Everett*, 180 N.C. App. at 319, 636 S.E.2d at 828 (internal quotation marks and citation omitted). Only an expert can give competent opinion evidence as to causation in complicated cases, and "when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (internal quotation marks omitted). Still, medical opinions may be "based either on personal knowledge or observation or on information supplied him by others, including the patient," as "[s]tatements made by a patient to his physician for the purposes of treatment and medical information obtained from a fellow-physician who has treated the same patient are 'inherently reliable.'" *Booker v. Medical Center*, 297 N.C. 458, 479, 256 S.E.2d 189, 202 (1979) (internal citations omitted).

The Commission made several findings of fact addressing the status of Plaintiff's condition following all of the incidents at issue—the initial trauma, the subsequent work-related incidents, and the casse-role-lifting event—and the cause thereof:

20. Plaintiff returned to Dr. Hankley on June 12, 2008, when he reported she had been working under restricted duty and her pain was getting worse, specifically noting more low back pain and right SI joint pain. He further noted plaintiff reported significant back pain and spasms after simply lifting a casserole out of the oven and that her spasms were so severe that she had to lie on the floor. These were the very same complaints plaintiff made to Staff Health on February 27, 2008. Dr. Hankley's diagnosis did not change and he reported her SI joint pain could be referred

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

from her low back and spondylolisthesis. Dr. Hankley recommended an MRI scan and left plaintiff's restrictions unchanged.

....

23. On June 26, 2008, plaintiff returned to Dr. Hankley with continued complaints of severe low back pain and bilateral lower extremity pain, left worse than right. Dr. Hankley reviewed the MRI scan and diagnosed bilateral pars defect with Grade I spondylolisthesis and severe left and mild right neuroforaminal encroachment, which confirmed her earlier x-rays of May 20, 2008. No disc herniation or other cause for her leg pain was noted. Dr. Hankley continued work restrictions and recommend[ed] an epidural injection. Dr. Hankley did not indicate that plaintiff had sustained any new injury or intervening incident.

24. On July 16, 2008, plaintiff was evaluated by Dr. Ralph Loomis, a board certified neurosurgeon, at which time she again reported the onset of her symptoms in February when "she was assisting a patient move from a gurney to bedside post surgically and felt a little twinge in her back about 30 minutes later her low back began hurting" which got progressively worse over the next few hours. It was noted her pain never resolved and at the end of June she began to notice trouble with her left thigh. On exam Dr. Loomis reported diffuse weakness in her left leg and, after review of her MRI, diagnosed spondylolisthesis at L5-S1, lumbar stenosis and foraminal stenosis, low back pain, left leg weakness and radiculopathy. A nerve root block was recommended which was done on August 14, 2008, and which provided significant relief of her symptoms.

....

27. Plaintiff was next evaluated for a second opinion by Dr. Jon Silver . . . on October 22, 2008, at which time she was noted on exam to have mild tenderness to palpation in the lower lumbar region with moderate left sciatic notch tenderness. . . . Based on his examination, Dr. Silver noted that the lifting injury aggravated the spondylolisthesis in that plaintiff already had some nerve root compression and this lifting injury irritated the root. Plaintiff was thereafter referred to Dr. Margaret Burke, a specialist in physical medicine and rehabilitation, to undergo rehabilitation to try to avoid a surgical fusion.

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

28. In a letter dated October 23, 2008, Dr. Loomis agreed with Dr. Silver's opinion that plaintiff's lifting injury aggravated her spondylolisthesis and that she was incapable of performing her duties as a nurse for defendant.

29. Plaintiff ultimately underwent a lumbar interbody fusion at L5-S1 on December 1, 2008 with Dr. Loomis. . . .

. . . .

31. Both Dr. Burke and Dr. Loomis are of the opinion, and the Full Commission finds, that plaintiff's back complaints beginning in February, 2008, were a direct result of her lifting incident on February 26, 2008, and her condition was further aggravated by her incidents of March 7, March 10, and May 20, 2008, all of which necessitated her surgery and resulted in her disability.

32. Mr. Klaaren, defendants' [sic] own Staff Health physician's assistant, indicated that plaintiff's complaints remained consistent and in his opinion her low back and SI complaints were the same complaints caused by her initial injury of February 26, 2008, and were treated as such during all evaluations by Staff Health personnel.

33. Dr. Hankley agreed that plaintiff's low back and bilateral SI joint pain and symptoms were referred from the aggravation of her spondylolisthesis. However, Dr. Hankley testified that such complaints somehow resolved without explanation. He believed that plaintiff's complaints of left legs [sic] symptoms were a result of picking up a casserole in late June 2008 and therefore her subsequent symptoms were unrelated to her injury. However, Dr. Hankley admitted that in reaching such opinion, he was not aware of plaintiff's post-injury consistent bilateral SI joint pain and could not reach an opinion about the significance of such complaints.

34. Greater weight is afforded to the opinions of Dr. Burke, Dr. Silver and most specifically Dr. Loomis than to Dr. Hankley. Dr. Loomis actually performed plaintiff's surgery and was given the complete history of plaintiff's complaints from February 26, 2008 until his surgical recommendation.

Defendant contends that "Dr. Loomis' opinion is based on assumptions he made about plaintiff's symptoms following the 26 February 2008 incident that are not supported by the record, as well

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

as incorrect information provided by plaintiff herself, rather than the objective medical evidence documenting plaintiff's symptoms." Dr. Loomis testified to the significance of Plaintiff's bilateral SI joint pain arising in February 2008 and aggravated by specific incidents in March and May 2008: "Most patients with spondylolisthesis affect both nerve roots left and right. So though it can occur, it would be rare for the patient to present with unilateral symptoms." Dr. Loomis also confirmed that patients often describe the symptoms as being bilateral at certain times and worse on one side than the other at other times: "They almost always say it's worse on one side or the other." Dr. Loomis found it significant that Plaintiff had reported experiencing bilateral SI joint pain on at least two occasions prior to seeing him.

While Defendant challenges Dr. Loomis' reliance on Plaintiff's own "subjective" reports of her injuries and symptoms, it is well-established that a patient's statements to her treating physician are reliable. *See, e.g., Booker v. Medical Center*, 297 N.C. at 479, 256 S.E.2d at 202 (1979); *Cherry v. Harrell*, 84 N.C. App. 598, 606, 353 S.E.2d 433, 438 (1987); *see also Adams v. Metals USA*, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362 (2005) ("The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination."). Moreover, Defendant fails to challenge several aspects of the opinion and award indicating Plaintiff was indeed having bilateral SI joint pain on several occasions prior to the casserole event, including findings of fact that: (1) Mr. Klaaren noted Plaintiff had spasms, low back pain, and "bilateral SI joint area pain" when he examined her the day after the 26 February injury; (2) Ms. Hawes at Staff Health saw Plaintiff on 22 May 2008 and noted Plaintiff's "discomfort over the bilateral sacral area"; and (3) after seeing Dr. Hankley on 30 May 2008 and Defendant's denial her claim on 4 June 2008, Plaintiff "continued to work in the operating room [on light duty] and continued to have low back and bilateral SI joint pain." As such, these findings are deemed supported by competent evidence, are binding on appeal, and further prove that Dr. Loomis was entitled to rely on Plaintiff's history of bilateral pain following the 26 February event in forming his opinion as to causation.

Dr. Loomis went on to testify that the bilateral SI joint pain would be considered referred pain from her spondylolisthesis grade one L5-S1. He opined that the cause of her condition, which led him to recommend surgery, was Plaintiff's "lifting event where she helped move

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

a patient from a gurney to a bedside in February of '08." This opinion was based on Plaintiff's history of bilateral SI problems; her neurologic exam, MR scan, and cystometrogram; and her responses to conservative management and steroidal injection. Dr. Loomis also flatly rejected having any different opinion if Plaintiff "was complaining of left-sided low back and leg symptoms greater than right," noting that "it's affected on both sides." When pressed by defense counsel that Plaintiff's symptoms reported in late June were "substantially different than those she reported prior to [the date she discussed lifting a casserole]," Dr. Loomis would not agree that "a left thigh weakness and radiation [were] different than SI joint pain." Rather, he believed the "SI joint pain [was] radiating pain. It's referred pain." He repeated that even if Plaintiff "specifically had denied radiating symptoms prior to that date[,] . . . [i]t would not change [his] opinion," clearly stating: "I think it was from the original [incident]."

Defendant, however, disputes this evidence as incompetent—and simultaneously challenges finding of fact 34 that Dr. Loomis "was given the complete history of plaintiff's complaints from February 26, 2008" before recommending surgery—by arguing that "he did not review any of plaintiff's prior medicals" or "have any firsthand knowledge of her symptoms from February of 2008 until July of 2008" when he treated her. This argument ignores that, in soliciting Dr. Loomis' opinion as to causation, counsel for both parties apprised him of all the information Defendant now contends the expert needed, but lacked, in attributing Plaintiff's disability to her 26 February 2008 work injury rather than the casserole-lifting event:

[Plaintiff's counsel] [I]f . . . the medical records had indicated [Plaintiff] had bilateral SI joint problems in February, again bilateral SI joint problems May 22nd, that she saw Dr. Hankley on . . . May 30th for right low back and SI joint problems, according to his notes; and that she went back to see him approximately a week later, and reported in his notes chief complaint low back pain, right SI pain; and also says "she has pain over the right SI area, but also having more and more low back pain, this is actually worse on the left side." Then she recites that she was having difficulty doing her job at Mission Hospital, and that Dr. Hankley stated in fact she stated she was lifting a heavy — lifting a casserole at home and felt back pain; had spasms and had to lay on the floor. Does that sound like something that dramatically altered her medical course?

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

[Dr. Loomis] I don't think so, no.

[Plaintiff's counsel] I mean the fact she recited she lifted a casserole?

[Dr. Loomis] No.

Dr. Loomis further indicated that fact would neither "affect [his] evaluation and recommendation for treatment of [Plaintiff]" nor alter his "opinions that [he had] stated with regard to what caused her problems." Acknowledging that he did not have firsthand knowledge of Plaintiff's symptoms prior to July 2008, Dr. Loomis testified that he did not only rely on Plaintiff's reports to him but also on his practical experience that SI joint pain can be referred from the L5-S1 level. He agreed that Plaintiff's left-sided radicular symptom and left leg weakness indeed contributed to his ultimate decision to perform surgery but again emphasized that his opinion remained unchanged even when asked by defense counsel to assume the following factors: (1) Plaintiff was diagnosed with a lumbar strain and history consistent with secondary spasm on 27 February 2008, the day after the original incident; (2) her pain on 10 March 2008 was localized to the right SI joint and during subsequent evaluation by Dr. Hankley on 30 May 2008, she reported "SI joint pain with no radiation to her lower extremities, no numbness, tingling or weakness," leading to a diagnosis of "right SI joint pain and grade one spondylolisthesis L5 on S1 with probable L5 spondylosis"; (3) Plaintiff's chiropractor documented right SI joint pain from March to early June 2008 but in late June noted severe left buttock and anterior thigh pain; and (4) Plaintiff reported more low back pain specifically on the left side to Dr. Hankley on 12 June 2008, the date she discussed lifting a casserole out of the oven, and subsequently observed "severe low back pain radiating into her posterior and anterior thigh on the left side." Thus, prior to restating his opinion that Plaintiff's current condition was caused by the 26 February injury, Dr. Loomis was repeatedly presented with the very "objective medical evidence documenting plaintiff's symptoms" that Defendant suggests was necessary to make his testimony competent. Moreover, Dr. Loomis was given every opportunity to agree that the casserole-lifting event was an intervening event, causing Plaintiff's radicular symptoms and left leg pain entirely independently of the 26 February lifting injury, but maintained his position that her current condition flowed from the original incident, such that Plaintiff's left side and radicular injuries likewise arose out of her employment.

We conclude the evidence above provides ample, competent support for the Commission's findings accepting Dr. Loomis' opinion that

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

Plaintiff's condition, necessitating her surgery and causing her disability, was the direct result of her 26 February injury and the three subsequent work-related aggravations. Where Dr. Loomis' competent opinion testimony is, in itself, sufficient to substantiate the Commission's findings regarding causation, we need not review Defendant's challenges to the findings related to the testimony of Drs. Burke and Silver. Moreover, we do not engage in any review of the Commission's decision to afford particularly greater weight to Dr. Loomis' opinion while discounting Dr. Hankley's belief that Plaintiff's symptoms demanding surgery were unrelated to the original injury. The Commission's conclusion that Plaintiff's current medical condition was causally related to her compensable injuries is likewise supported by these findings of fact. Therefore, we affirm the Commission's award, including ongoing temporary disability compensation until Plaintiff returns to work or further order by the Commission and all incurred and future medical expenses related to treatment of her condition.

Plaintiff's Appeal

[2] Plaintiff argues that the Commission erred in finding that "[t]he defense of this claim was reasonable and not stubborn, unfounded litigiousness," where the findings of fact and conclusions of law allegedly ignore certain evidence specified in Plaintiff's brief, and in declining to award Plaintiff attorney's fees under N.C. Gen. Stat. § 97-88.1. Pursuant to this statute, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2009). "This statute applies to an original hearing and its purpose is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Price v. Piggy Palace*, — N.C. App. —, —, 696 S.E.2d 716, 723 (2010) (internal quotation marks and citation omitted).

We review an award or denial of attorney's fees under N.C. Gen. Stat. § 97-88.1 pursuant to a two-part analysis. *Meares v. Dana Corp.*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008). "First, '[w]hether the [defendant] had a reasonable ground to bring a hearing is reviewable by this Court *de novo*.'" *Id.* (quoting *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50-51, 464 S.E.2d 481, 484 (1995)). If this Court concludes that a party did not have reasonable ground to bring or

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

defend a hearing, then we review the decision of whether to make an award and the amount of the award for an abuse of discretion. *Troutman*, 121 N.C. App. at 54-55, 464 S.E.2d 486. In conducting the first step of the analysis, we consider the evidence presented at the hearing to determine the reasonableness of a defendant's claim. *See Cooke v. P.H. Glatfelter/Ecusta*, 130 N.C. App. 220, 225, 502 S.E.2d 419, 422 (1998) (instructing that "the Commission (and a reviewing court) must look to the evidence introduced at the hearing" to determine whether a hearing has been defended without reasonable ground). As such, "[t]he burden [is] on the defendant to place in the record evidence to support its position that it acted on 'reasonable grounds.'" *Shah v. Howard Johnson*, 140 N.C. App. 58, 64, 535 S.E.2d 577, 581 (2000). Mindful that "the test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness," *Cooke*, 130 N.C. App. at 225, 502 S.E.2d at 422 (internal quotation marks and citations omitted), we conclude, as discussed below, that Defendant's denial of Plaintiff's claim and defense of the hearing was not reasonable.

The Commission's opinion and award contains findings of fact, which have not been challenged on appeal, detailing Plaintiff's February 2008 injury and Defendant's undisputed knowledge thereof, including: (1) while Plaintiff was assisting in post-surgical patient transfer on 26 February 2008, she "leaned across the bed and reached out her hand . . . felt a pain in her back"; (2) her back pain became more severe after finishing the patient transfer during the remaining hour of her shift; (3) immediately upon arrival the next morning, she "reported the back injury of the previous day to her supervisor," Ms. Caraway, and obliged Ms. Caraway's instructions to complete an injury report on RiskMaster; (4) Plaintiff "reported the claim as a workplace injury[,] . . . noted that the cause of her injury was moving a patient," and described her pain as becoming "worse during the last hour of her shift"; (5) Defendant's own "risk management staff then reported that the claim fell under the 'Workers Comp SIR' insurance policy"; (6) when Mr. Klaaren restricted Plaintiff to light duty on 27 February 2008, Ms. Caraway advised her own supervisors "of plaintiff's injury and limited work status," and "Ms. Farmer confirmed at the hearing before the Deputy Commissioner that Ms. Caraway advised her of plaintiff's report of injury shortly after the incident occurred"; (7) Plaintiff reported three precise incidents thereafter—including holding a large abdominal apron of a 300-pound patient on 7 March 2008, "attempting to remove the base from an operating

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

room table” on 10 March 2008, and “attempting to move a Bookwalter ring weighing approximately 50 pounds” on 20 May 2008—which re-aggravated her back injury; (8) each of Plaintiff’s Staff Health visits described in the record was scheduled and reported by defendant as a “workers’ compensation evaluation” or “a follow-up workers’ compensation evaluation for plaintiff’s February 26, 2008 injury”; (9) Ms. Carpenter, Defendant’s operating room director, was informed of Plaintiff’s condition several times, including: by Ms. Caraway right after the initial injury; by email from Plaintiff on 13 March 2008, detailing her 7 and 10 March re-injuries; and on 11 April 2008 by Dr. Martin, who noted Plaintiff’s date of injury as 26 February 2008, described her injury as “work related,” and “advis[ed] [Ms. Carpenter] of plaintiff’s continuing SI joint pain since [that date]”; and (10) “Plaintiff reported her injury assisting a patient, followed by severe low back pain and SI joint pain 30 minutes later, as well as her re-aggravation a week later” to Dr. Hankley, who “stated that plaintiff aggravated her SI joint during her two lifting and patient assisting movements which ‘continues to aggravate it while she is doing full duty.’ ”

Notwithstanding these facts, Defendant, through its adjuster Ms. Mikos, informed Plaintiff that it was denying her claim because she had not reported an accident or specific traumatic injury.

Under the specific traumatic incident provision of section 97-2(6) of the North Carolina General Statutes, a plaintiff must prove an injury at a judicially cognizable point in time. N.C. Gen. Stat. § 97-2(6) (2003). The term “judicially cognizable” requires a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred.

Goforth v. K-Mart Corp., 167 N.C. App. 618, 622, 605 S.E.2d 709, 712 (2004) (internal quotation marks omitted). The Commission made the following pertinent findings of fact:

14. On or about May 27, 2008, Janet Mikos, defendant’s adjuster, became aware of plaintiff’s claim and interviewed plaintiff about her February 26, 2008, incident. Ms. Mikos had been working for defendant for approximately one month. Ms. Mikos did not record the conversation with plaintiff, but entered a summary of her notes of the conversation into defendant’s claims management system, Risk Master, on May 27, 2008. Ms. Mikos had access to plaintiff’s initial February 27, 2008, Risk Master report in which plaintiff reported the cause of her injury was moving a patient and in a separate section noted her pain became more severe in

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

the last hour of her shift. Ms. Mikos was further aware that this claim had been timely and properly reported and entered into the Risk Master system as a “medical only” workers’ compensation claim.

15. During their conversation on May 27, 2008, plaintiff explained to Ms. Mikos that she had been asked to assist in transferring a post-surgical patient to an upstairs room, which was not her regular job. Plaintiff reached out across a bed and let the patient grab her arm to assist the 300-pound patient transfer into a bed, at which time she felt pain in her low back. Plaintiff also told Ms. Mikos that she returned downstairs to her normal work station, sat at a desk during the last hour of her shift, and had increasing back pain until she left for home. . . .

16. Ms. Mikos advised plaintiff that since neither she nor the patient she was assisting slipped, tripped or fell, such incident did not qualify for workers’ compensation coverage. This statement is confirmed by Ms. Mikos’s Risk Master entry which reported “there is no specific traumatic event, no fall, no trip, no stumbling o[f] either the clmt [claimant] or any patient that she may have been assisting.”

17. By letter to plaintiff dated June 4, 2008, defendant denied plaintiff’s claim based on that portion of the Risk Master report which reported plaintiff’s lower back started hurting during the last hour of her shift; Ms. Mikos’ mistaken opinion that because plaintiff did not report a trip or fall, no injury by accident occurred; and because the initial Staff Health report stated that plaintiff experienced no clear inciting event. Defendant reached the decision to deny the claim without consulting or interviewing plaintiff’s supervisor Ms. Caraway, who left defendant’s employment in June 2008. Defendant acknowledged on their [sic] Form 19 that Ms. Caraway first knew of plaintiff’s injury on February 27, 2008.

Notwithstanding the undisputed evidence that on 27 February 2008, Plaintiff reported the cause of her injury as moving a patient; that Ms. Mikos had access to this initial RiskMaster report and was further aware that the claim had been timely and properly reported and entered into the system as a workers’ compensation claim; that Plaintiff reported both the initial and subsequent, re-aggravating “inciting events” to her supervisors and Staff Health; that Defendant’s own records documented each of Plaintiff’s visits to Staff Health as part of continuous treatment from the 26 February injury; and that

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

during Ms. Mikos' own conversation with Plaintiff, Plaintiff fully detailed her initial pain from assisting with patient transfer and the three specific subsequent incidents, Ms. Mikos advised Plaintiff that her claim was being denied because there was no specific traumatic event.¹

Our review of other testimony and the exhibits introduced at the hearing confirms that Defendant intentionally disregarded information identifying not just one, but four, clearly compensable work-related injuries sustained by Plaintiff and that its denial of compensation was not based on any mistaken opinion held by Ms. Mikos. In deciding to deny Plaintiff's claim, even after reviewing the RiskMaster report and hearing first-hand accounts from Plaintiff regarding her initial and aggravating injuries, Ms. Mikos made no effort to confirm Plaintiff's report of injury from moving a patient with Ms. Caraway. There was no attempt to consult with Mr. Klaaren, who treated Plaintiff after the original injury and subsequent incidents and testified to his opinion that each of the 26 February, 7 March, 10 March, and 20 May 2008 injuries were all valid workers' compensation claims. And although Ms. Mikos was clearly aware of the subsequent, "specific traumatic" lifting incidents, she completely neglected to look into them further. Thus, when Ms. Mikos advised Plaintiff by letter on 4 June 2008 that her claim was being denied solely "based on [Defendant's] investigation [which revealed] there was no 'accident,'" no honest investigation had in fact taken place. Plaintiff emailed Ms. Mikos on 19 July 2008 for reconsideration of her claim, reminding the adjuster that Staff Health employees and Dr. Hankley had all reported Plaintiff's back pain as work-related injury. Ms. Mikos responded by email on 25 July 2008, wherein she reiterated Defendant's position that "there was no 'specific traumatic accident'" and also further misstated the facts by writing:

1. Even assuming Ms. Mikos did make a mistake in deciding what was required to trigger workers' compensation coverage, the Commission's finding of fact 17 regarding Ms. Mikos' mistaken beliefs would not support the Commission's conclusion that the defense of Plaintiff's claim was reasonable. This Court has held that a denial of benefits based on misapplication or unawareness of the law is not reasonable and justifies the imposition of sanctions under § 97-88.1. *See Troutman*, 121 N.C. App. at 52, 464 S.E.2d at 484 ("Defendant's ignorance of a 1986 North Carolina case directly on point provides no support for their contention that grounds for requesting a hearing in 1991 were reasonable. Such a construction would encourage incompetence and thwart the legislative purpose of N.C.G.S. § 97-88.1."); *see also Goforth*, 167 N.C. App. at 623-24, 605 S.E.2d at 713 (affirming Commission's sanction of attorney's fees under § 97-88.1 where the employer's causation argument, that plaintiff's injury was the result of his preexisting back condition, was unsupported by North Carolina law).

CAWTHORN v. MISSION HOSP., INC.

[211 N.C. App. 42 (2011)]

We also have the issue of late reporting. Per my conversation with Renee Carpenter, she was not aware of the injury until May 22, 2008 when the event was entered into our claim handling system (RiskMaster). A thorough and immediate investigation is necessary to fully document the file to support any compensability decision. We were prejudiced by the passing of three months.

Both statements as to when Ms. Carpenter became aware of Plaintiff's injury and when the event was entered into RiskMaster are false. In fact, Defendant acknowledged in its Form 19 that the "[d]ate [Defendant] or the supervisor [Ms. Caraway] first knew of [the] injury" was "2/27/08." Even still, Defendant maintained its position that its denial of the claim was based on Plaintiff's failure to report any specific accident and its unawareness of such incidents until 27 May 2008, answering Plaintiff's interrogatories: "[D]efendants [sic] contend that plaintiff did not relate her back injury to moving a patient until after the denial of her claim." This position seems further implausible where the RiskMaster report describing the 26 February incident ascribes "Cause Code: MP Moving Patient" to the event complaint of by Plaintiff.

While it is reasonable for "an employer with *legitimate* doubt regarding the employee's credibility, based on *substantial evidence* of conduct by the employee inconsistent with his alleged claim" to defend a hearing, *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982) (emphasis added), the overwhelming evidence in this case—not just from Plaintiff but also from Staff Health personnel, Defendant's own internal records, and other medical experts treating Plaintiff—leaves no room for any legitimate doubt. Rather, Defendant's intentional disregard of information indisputably known to it in this matter and its affirmative failure to investigate obvious avenues that would have clarified the events surrounding each of Plaintiff's reported injuries were certainly not reasonable. Not only was its defense of this matter unreasonable, but the tactics in which Defendant engaged constituted a conscious attempt to mislead Plaintiff as to her entitlement to workers' compensation benefits. Accordingly, we conclude that the Commission erred in finding Defendant's denial of benefits and defense of this action reasonable and remand for a determination of the amount of attorney's fees to be awarded Plaintiff under § 97-88.1.

We affirm the Commission's decision awarding Plaintiff ongoing temporary total disability benefits until further order. We reverse the

STATE v. CLARK

[211 N.C. App. 60 (2011)]

portion of the opinion and award finding Defendant acted reasonably in this matter and remand for the imposition of attorney's fees under N.C. Gen. Stat. § 97-88.1 to be taxed against Defendant.

Affirmed in part; Reversed and remanded in part.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA v. JOSHUA NEWTON CLARK

No. COA10-403

(Filed 19 April 2011)

1. Confessions and Incriminating Statements— statements to detective—voluntary

The trial court did not err by denying a first-degree rape defendant's motion to suppress statements he made to a detective before he was given *Miranda* warnings. Although defendant was told to wait at a patrol car at the scene, this amounted only to an attempt by officers to control the scene and prevent emotional encounters between a suspect and the victim's family. The detective who took the statements directly and clearly informed defendant that he was not under arrest, defendant repeatedly asked to speak with the detective, and defendant voluntarily accompanied the detective to the sheriff's department.

2. Appeal and Error— notice of appeal—satellite-based monitoring—written notice required

An oral notice of appeal was not sufficient to confer appellate jurisdiction to review a satellite-based monitoring (SBM) order because SBM is civil rather than criminal in nature. Although defendant noted his appeal orally rather than in writing, his motion for *certiorari* was granted because of the uncertainty about the proper method of appealing SBM orders at the time.

3. Satellite-Based Monitoring— aggravated offense—first-degree rape of child under thirteen

The trial court did not err by ordering defendant to enroll in satellite-based monitoring for the rest of his natural life after he was convicted of the first-degree rape of a child. Although the trial court's determination of an aggravated offense could not be

STATE v. CLARK

[211 N.C. App. 60 (2011)]

upheld based on the “child victim” prong of N.C.G.S. § 14-208.6(1a) and the underlying factual scenario could not be considered, the elements of first-degree rape as defined in N.C.G.S. § 14-27.2(a)(1) gave the trial court ample basis for determining that defendant committed an act involving vaginal penetration. Since a child under the age of thirteen is inherently incapable of consenting to sexual intercourse, the rape of such a victim necessarily involves the use of force or the threat of serious violence and the definition of aggravated offense was satisfied by the “violent conduct” prong of N.C.G.S. § 14-208.6(1a).

4. Constitutional Law— ex post facto—ineffective assistance of counsel—not available for satellite-based monitoring claims

Ineffective assistance of counsel claims are not available to satellite-based monitoring (SBM) defendants because SBM is civil in nature. Moreover, any *ex post facto* claim defendant’s lawyer might have raised would not have been successful for the same reason.

Appeal by Defendant from judgment entered 29 October 2009 by Judge F. Donald Bridges in Burke County Superior Court. Heard in the Court of Appeals 29 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

ERVIN, Judge.

Defendant Joshua Newton Clark appeals from a judgment sentencing him to a minimum term of 156 months and a maximum term of 197 months imprisonment in the custody of the North Carolina Department of Correction based upon his conviction for first degree rape and an order requiring him to enroll in lifetime satellite-based monitoring (SBM) following his release from prison. After careful consideration of Defendant’s challenges to the trial court’s judgment and order in light of the record and the applicable law, we find no basis for providing Defendant with any relief on appeal.

STATE v. CLARK

[211 N.C. App. 60 (2011)]

I. Factual BackgroundA. Procedural Facts

On 3 May 2006, a warrant for arrest charging Defendant with first degree burglary, first degree rape of a child, and first degree sexual offense against a child was issued. On 5 May 2006, a warrant for arrest charging Defendant with taking indecent liberties with a child was issued. On 5 June 2006, the Burke County grand jury returned bills of indictment charging Defendant with taking indecent liberties with a child and first degree rape.

On 11 May 2009, Defendant filed a motion to suppress certain inculpatory statements that he had made to Detective John R. Huffman of the Burke County Sheriff's Department on 3 May 2006. Defendant sought suppression of these statements on the grounds that they stemmed from a violation of his right to the assistance of counsel and in the absence of a valid waiver of his right to be free from compelled self-incrimination. Defendant's suppression motion was heard before Judge James E. Hardin, Jr., at the 11 May 2009 session of the Burke County Superior Court. At the conclusion of the hearing, Judge Hardin orally denied Defendant's suppression motion. On 5 November 2009,¹ Judge Hardin entered a written order that contained extensive findings of fact and conclusions of law denying Defendant's suppression motion.

In light of Judge Hardin's decision to deny his suppression motion and while reserving his right to "appeal specified rulings of the trial court as specified in the plea proceedings," Defendant entered an *Alford* plea to first degree rape at the 26 October 2009 criminal session of the Burke County Superior Court. In return for Defendant's plea, the State voluntarily dismissed the indecent liberties charge.² At the sentencing hearing, the trial court found that Defendant had no prior record points and should be sentenced as a Level I offender, that he had "voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer [] at an early stage of the criminal process," and that "the factors in mitigation outweigh[ed] the factors in aggravation," so that a "mitigated sentence [was] justified." As a

1. Although Judge Hardin's order was dated 25 July 2009, it was not filed until 5 November 2009.

2. The State also dismissed the first degree sexual offense and first degree burglary charges that had been originally asserted against Defendant on 8 June 2006, with this dismissal predicated on the fact that the grand jury had indicted Defendant for taking indecent liberties with a child and first degree rape of a child.

STATE v. CLARK

[211 N.C. App. 60 (2011)]

result, the trial court ordered that Defendant be imprisoned for a minimum term of 156 months and a maximum term of 197 months in the custody of the North Carolina Department of Correction.

After the imposition of judgment, the trial court conducted a hearing for the purpose of determining, among other things, whether Defendant should be required to enroll in SBM. At the conclusion of the SBM hearing, the trial court found that Defendant had been convicted of an offense against a minor as defined in N.C. Gen. Stat. § 14-208.6(1i) and a sexually violent offense as defined in N.C. Gen. Stat. § 14-208.6(5), that the conviction offense was an aggravated offense as defined in N.C. Gen. Stat. § 14-208.6(1a), and that Defendant should be required to enroll in SBM “for [his] natural life.” Defendant orally noted an appeal to this Court after the entry of the trial court’s judgment. In addition, Defendant has petitioned this Court for the issuance of a writ of *certiorari* directed to the trial court’s SBM order on 4 June 2010.

II. Substantive Facts**A. State’s Evidence at the Suppression Hearing**

At the suppression hearing, the State presented the testimony of Detective Huffman. Detective Huffman testified that, on 2 May 2006, he received a call reporting that a sexual assault had been committed against a child and responded to the home where the child resided. As Detective Huffman arrived at the child’s residence, Defendant, who was standing in the driveway by himself, inquired if Detective Huffman was the detective responsible for handling the case. After Detective Huffman responded in the affirmative, Defendant stated that he needed to speak with Detective Huffman in order “to make some wrongs right.” Although Detective Huffman told Defendant that he would need to make contact with the child first, he assured Defendant that he would speak with him after that had been done.

Detective Huffman remained in the child’s house for approximately thirty to forty-five minutes. As Detective Huffman exited the residence, Defendant approached Detective Huffman for a second time and again stated that he needed to speak with Detective Huffman. Detective Huffman “explained to [Defendant] that [he] was not going to discuss the case . . . in the victim’s driveway,” but “would be more than happy to talk to [Defendant] at the sheriff’s office.” Detective Huffman offered Defendant a ride to the Burke County Sheriff’s Department in his vehicle, an unmarked Crown Victoria. As an alternative, Detective Huffman told Defendant “that he could call

STATE v. CLARK

[211 N.C. App. 60 (2011)]

family or friends to get . . . a ride.” Defendant elected to ride with Detective Huffman.

As the two men traveled to the Sheriff’s Department, Defendant rode in the front seat of Detective Huffman’s vehicle without being subject to any restraints. During this drive, which lasted approximately fifteen to twenty minutes, Detective Huffman and Defendant refrained from discussing the case. Upon arriving at the Sheriff’s Department, Defendant entered the building through the back door and followed Detective Huffman to an interview room.

After the two men reached the interview room, Detective Huffman asked Defendant what “wrongs he needed to make right.” At this time Defendant made the inculpatory statements which underlie his motion to suppress. While interacting with Defendant on 2-3 May 2006, Detective Huffman explicitly informed Defendant that he was not under arrest.

Q.: Did you tell [Defendant] prior to getting in the car, or while he was in the car that he was not under arrest?

A.: Yes.

Q.: Do you recall how many times you told him that?

A.: Multiple, he stated he understood and he wanted to make wrongs right.

Detective Huffman was wearing blue jeans and a sweater, had no visible firearm or other weapon in his possession, and did not have a visible police identification badge or handcuffs on his person.

B. Defendant’s Evidence at the Suppression Hearing

At the suppression hearing, Defendant testified that he went to the child’s home at approximately 11:00 p.m. on 2 May 2009. At that time, Defendant noticed a Sheriff’s Department car in the driveway. Defendant pulled into the driveway, exited his vehicle, walked up to the front door, and knocked. The child’s father, who “was irate,” answered the door. A law enforcement officer approached Defendant and asked Defendant to “come with him.” Defendant complied with the officer’s request. Defendant further testified that he believed the officer “was trying to get me away from the scene.” Defendant stood with or around one or more police officers for approximately an hour before Detective Huffman arrived and waited for an additional twenty to thirty minutes while Detective Huffman was inside the

STATE v. CLARK

[211 N.C. App. 60 (2011)]

child's residence. At some point during this interval, Defendant attempted to approach the child's sister, who was his girlfriend, and was instructed to "come back" by a nearby officer. Defendant testified that "I never felt like I was able to [leave the scene]," that, "I have never really been in trouble," and that "I am pretty intimidated by the police."

III. Legal AnalysisA. Motion to Suppress

[1] On appeal, Defendant contends that Judge Hardin erred by denying his suppression motion on the grounds that he had not been provided with, and appropriately waived, the necessary *Miranda* warnings. In challenging the denial of his suppression motion, Defendant argues that Judge Hardin failed to make adequate findings of fact as required by N.C. Gen. Stat. § 15A-977(d) because he did not resolve the conflict in the evidence arising from Defendant's testimony that he was moved to a patrol car and ordered to remain there after he attempted to approach the alleged victim's father and to talk to his girlfriend and that these deficiencies in Judge Hardin's findings prejudiced him. Defendant's argument lacks merit.

In reviewing a trial court's order ruling on a motion to suppress, we are " 'strictly limited to determining whether the trial [court's] underlying findings of fact are supported by competent evidence[.]' " *State v. Orteiz*, 178 N.C. App. 236, 243-44, 631 S.E.2d 188, 194-95 (2006) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *disc. review denied*, 361 N.C. 434, 649 S.E.2d 642 (2007). Assuming that the trial court's factual findings have adequate evidentiary support, they are conclusive for purposes of appellate review even if the record contains conflicting evidence. *State v. Crudup*, 157 N.C. App. 657, 659, 580 S.E.2d 21, 23 (2003) (citing *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). In addition, any findings of fact which the defendant fails to challenge on appeal are binding for purposes of appellate review. *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (citing *State v. Lacey*, 175 N.C. App. 370, 376, 623 S.E.2d 351, 355 (2006)), *app. dismissed*, 362 N.C. 364, 664 S.E.2d 311 (2008). " 'Once [we] conclude[] that the trial court's findings of fact are supported by the evidence, [our] next task "is to determine whether the trial court's conclusion[s] of law [are] supported by the findings." ' " *Id.* (quoting *State v. Brewington*, 352 N.C. 489, 498-99, 532 S.E.2d 496, 502 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992, 121 S. Ct. 1126 (2001)). A trial court's determinations concerning whether a person is in custody and whether a custodial interrogation

STATE v. CLARK

[211 N.C. App. 60 (2011)]

has occurred are conclusions of law that are “fully reviewable on appeal.” *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). “‘[T]he trial court’s conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.’” *Id.* (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379 (2001)). Thus, “we review the trial court’s determination that [D]efendant was not entitled to *Miranda* warnings under a *de novo* [standard of] review.” *Crudup*, 157 N.C. App. at 659, 580 S.E.2d at 23.

In his order denying Defendant’s suppression motion, Judge Hardin found as a fact:

2. That on May 2, 2006 between 11:00-11:30, Detective J.R. Huffman responded to a call for service [at a location in]³ Morganton, Burke County, North Carolina. Detective Huffman was met by Sergeant [Robert] Powell of the Burke County Sheriff’s Office briefly describing an alleged sexual assault of [the child] and that [the child] was being taken to Grace Hospital. Detective Huffman encountered the Defendant, whereupon the defendant asked if he (Detective Huffman) was the detective working the case, that he (the Defendant) “needed to talk to him (Detective Huffman) and make some wrongs, right.” Detective Huffman was at the scene, and inside the residence, for approximately 30-40 minutes. During this time, he had no contact with the Defendant. As Detective Huffman was [exiting] the residence, the Defendant said that he “wanted to talk to the detective.” Detective Huffman indicated he would talk with the defendant at the office, but because he smelled alcohol on the Defendant, he could have a family member or friend bring the Defendant to the office or he (the Defendant) could ride with Detective Huffman, who was in an unmarked car, and who had no badge, gun or handcuffs showing. The Defendant decided to ride with Detective Huffman. The Defendant was not placed in handcuffs and was told specifically that he was not under arrest. While in route to the Sheriff’s Office, the Defendant repeated that “(he) wanted to make wrongs, right.”

3. The material set out in parenthesis in our quotation from Judge Hardin’s findings of fact was set out in brackets in the original order. The material set out in brackets in our quotation from Judge Hardin’s factual findings represents certain minor modifications that we have made to the quoted findings of fact for the purpose of consistency with the remainder of our opinion, the protection of the child’s privacy, or for similar reasons.

STATE v. CLARK

[211 N.C. App. 60 (2011)]

3. That at around 12:30-1:00 a.m. on May 3, 2006 and upon arrival at the Sheriff's Office, the Defendant was taken to an interview room where he made various oral statements that were later memorialized in writing. At this stage of the investigation of this case, there is no evidence before the Court to suggest or show that a warrant for the Defendant's arrest had been issued. That at approximately 11:00 p.m. on May 3, 2006, the Defendant voluntarily and "on (his) own accord" went to the Burke County Sheriff's Office. The Defendant was told "that he (the Defendant) did not have to talk with me (Detective Huffman)["] and that "you do not have to be here."

4. That the Defendant, according to Detective Huffman, appeared to be relaxed, was not under arrest, was not handcuffed, and was not told that he could not leave. . . .

5. . . . Following the Defendant's review of his written statement, the Defendant said "(d)o I need a lawyer?" Detective Huffman responded by saying that he could not give the Defendant legal advice. No[] effort was made to get a lawyer for the Defendant, but there is also no evidence that the Defendant was asked any additional questions. The interview concluded with the departure of Detective Huffman[,] who then stepped outside the interview room to prepare the subject arrest warrants which were to be considered by a Magistrate. While this was going on, the Defendant remained in the interview room, free to move and without handcuffs and with the door open. Once the warrants were completed, the Defendant was presented to the Magistrate.

6. Prior to the Defendant making oral and written statements to Detective Huffman, the Defendant was not given his *Miranda* warnings. Up to the point that the Defendant made these statements, no decision as to the Defendant's arrest on the subject charges had been made. Throughout the time the Defendant made these statements, he remained free to leave, was not placed in handcuffs or any other type of restraint, had not been fingerprinted or asked to submit to any type [of] non-testimonial evidence collection. Only after the Defendant made the oral and written statements was a decision made to charge him with the subject violations.

Based upon these findings of fact, Judge Hardin concluded as a matter of law, among other things, that "the requirements of *Miranda v.*

STATE v. CLARK

[211 N.C. App. 60 (2011)]

Arizona [were] not applicable to the subject statements of the Defendant because he was not in custody for purposes of the rule in that the Defendant was not under formal arrest and/or did not have his personal movement restrained to a degree associated with formal arrest.”

A suspect is entitled to receive *Miranda* warnings in the event that he or she is “subjected to police interrogation while in custody at the station or otherwise deprived of [his or her] freedom of action in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 477, 16 L. Ed. 2d 694, 725, 86 S. Ct. 1602, 1629 (1966); *see also Crudup*, 157 N.C. App. at 659, 580 S.E.2d at 24 (stating that “ ‘*Miranda* warnings are required only when a defendant is subjected to custodial interrogation’ ”) (quoting *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253, *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001)). “[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719, 97 S. Ct. 711, 714 (1977) (*per curiam*). Instead, “[t]he proper inquiry for determining whether a person is ‘in custody’ for purposes of *Miranda* is ‘based on the totality of the circumstances, whether there was a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” ’ ” *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (quoting *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003). The extent to which Defendant was in custody for *Miranda* purposes depends on the objective circumstances surrounding his interactions with law enforcement officers, “not on the subjective views harbored by . . . [Defendant].” *Stansbury v. California*, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 298, 114 S. Ct. 1526, 1529 (1994) (*per curiam*). As a result, the ultimate issue before Judge Hardin in the court below and before us on appeal is whether a reasonable person in Defendant’s position would have believed that he was under arrest or was restrained in such a way as to necessitate the provision of *Miranda* warnings.

In *State v. Waring*, — N.C. — , — , 701 S.E.2d 615, 633 (2010), the Supreme Court highlighted several factors that are appropriately considered in determining whether a particular suspect was in “custody” for *Miranda* purposes:

This Court has considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is hand-

STATE v. CLARK

[211 N.C. App. 60 (2011)]

cuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect[.]

(Internal citations omitted). In *Waring*, the defendant “was told he was being detained until detectives arrived but that he was not under arrest. When he was again advised by the detectives upon their arrival that he was not under arrest, defendant voluntarily agreed to accompany them to the police station, affirmatively telling them he was ‘anxious’ to talk with them and answer their questions.” *Id.* The Supreme Court reasoned that, although the defendant was initially informed by law enforcement officers that he was being “‘detained’ while he waited on the curb for the detectives to arrive,” “any custody associated with the detention ended when defendant left [the detaining officer] and voluntarily accompanied [the detectives]” to the police station. *Id.* at —, 701 S.E.2d at 634. In holding that a reasonable person in the defendant’s position would not have believed that he was under arrest or subject to such restraint in his movements as to require the administration of *Miranda* warnings, the Supreme Court emphasized that “any conflict engendered in defendant’s mind by being told at the outset that he was being detained pending the investigators’ arrival necessarily dissipated when those investigators appeared and specifically told defendant he was not under arrest.” *Id.*

At the suppression hearing, Defendant did not testify that he was ever explicitly informed by any law enforcement officer that he had been detained. Instead, Defendant merely claims that the fact that he was moved to a patrol car and instructed to remain there when he came in contact with the child’s father and that he was told to “come back and stay” at the location of the patrol car when he attempted to talk to his girlfriend, the child’s sister, was tantamount to a formal arrest sufficient to trigger the necessity for the administration of *Miranda* warnings and that Judge Hardin’s failure to address this issue in his findings of fact constituted an error of law. However, even if Judge Hardin had made factual findings consistent with Defendant’s testimony, such findings would not have established that Defendant was in “custody” for *Miranda* purposes. Instead of placing Defendant in detention, the officers’ actions amounted to nothing more than an attempt to control the scene and prevent emotional encounters between a suspect and members of the alleged victim’s family. Moreover, even if Defendant was detained for *Miranda* purposes while awaiting Detective Huffman’s emergence from the child’s house, *Waring* establishes that Defendant’s statements to Detective Huffman remain untainted as the result of subsequent events. The

STATE v. CLARK

[211 N.C. App. 60 (2011)]

testimony of Detective Huffman, upon which Judge Hardin based his findings of fact, demonstrates that Detective Huffman directly and clearly informed Defendant that he was not under arrest, that Defendant repeatedly requested to speak with Detective Huffman, and that Defendant voluntarily accompanied Detective Huffman to the Burke County Sheriff's Department. As a result, even if Judge Hardin erred by failing to make factual findings addressing Defendant's claim that he was placed in "custody" while Detective Huffman was inside the alleged victim's residence, any such error did not prejudice Defendant since the inclusion of findings of fact based on Defendant's testimony would not have established that his statements to Detective Huffman resulted from an impermissible custodial interrogation. Thus, we must reject Defendant's sole challenge to the trial court's judgment.

B. Satellite-Based Monitoring1. Appealability Issues

[2] Secondly, Defendant challenges the validity of the trial court's decision requiring him to enroll in lifetime SBM. In evaluating the lawfulness of a trial court order requiring a convicted defendant to enroll in SBM, " 'we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.' " *State v. McCravey*, — N.C. App. —, —, 692 S.E.2d 409, 418 (quoting *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009)), *disc. review denied*, 364 N.C. 438, 702 S.E.2d 506 (2010). Prior to addressing the merits of Defendant's claim, however, we must first determine if his appeal from the trial court's SBM order is properly before this Court.

We have previously held that, since an SBM-related proceeding is civil rather than criminal in nature, an " 'oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court' in a case arising from a trial court order requiring a litigant to enroll in SBM." *State v. Cowan*, — N.C. App. —, —, 700 S.E.2d 239, 241 (2010) (quoting *State v. Brooks*, — N.C. App. —, —, 693 S.E.2d 204, 206 (2010)). Instead, a defendant seeking to challenge an order requiring his or her enrollment in SBM must give written notice of appeal in accordance with N.C.R. App. P. 3(a) in order to properly invoke this Court's jurisdiction. *Brooks*, — N.C. App. at —, 693 S.E.2d at 206. According to N.C.R. App. P. 3(a), an appealing party

STATE v. CLARK

[211 N.C. App. 60 (2011)]

must “file[] [a written] notice of appeal with the clerk of superior court and serve[] copies thereof upon all other parties” as a precondition for challenging such an order on appeal. In view of the fact that Defendant noted his appeal from the trial court’s SBM order orally, rather than in writing, he failed to properly appeal the trial court’s SBM order to this Court, necessitating the dismissal of his appeal. *See Cowan*, — N.C. App. at —, 700 S.E.2d at 241 (explaining that a failure to give proper notice of appeal requires dismissal of the appellant’s appeal because “[t]he provisions of [N.C.R. App. P. 3] are jurisdictional”) (quoting *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443, *disc. review denied*, 360 N.C. 544, 635 S.E.2d 58 (2006)).

In recognition of his failure to file a written notice of appeal from the trial court’s SBM order, Defendant petitioned for the issuance of a writ of *certiorari* authorizing appellate review of his SBM-related claims on 3 June 2010. “[A] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C.R. App. P. 21(a)(1). We conclude that we should, in the exercise of our discretion, issue the requested writ of *certiorari* in order to permit review of Defendant’s challenge to the trial courts SBM order. Given that this Court did not hold that a written, rather than an oral, notice of appeal was required in order to appeal from an SBM-related order until approximately seven months after Defendant’s SBM hearing, “Defendant would have needed a considerable degree of foresight in order to understand that an oral notice of appeal pursuant to N.C.R. App. P. 4(a)(1) was ineffective” at the time the trial court entered its SBM-related order. *Cowan*, — N.C. App. at —, 700 S.E.2d at 242. In view of the uncertainty surrounding the proper method of seeking appellate review of trial court SBM orders that existed at the time that Defendant noted his appeal, it would be unfair for us to refuse to consider Defendant’s challenge to the trial court’s SBM order solely because he failed to file a written notice of appeal pursuant to N.C.R. App. P. 3(a). As a result, “[i]n the interest of justice, and to expedite the decision in the public interest,” we grant Defendant’s petition for writ of *certiorari* for the purpose of considering his challenges to the trial court’s SBM order on their merits. *Brooks*, — N.C. App. at —, 693 S.E.2d at 206.

2. Aggravated Offense

[3] On appeal, Defendant contends that the trial court erred by ordering him to enroll in lifetime SBM based on a finding that he had

STATE v. CLARK

[211 N.C. App. 60 (2011)]

been convicted of an “aggravated offense.” More specifically, Defendant contends that he could not properly be required to enroll in lifetime SBM pursuant to N.C. Gen. Stat. § 14-208.40A(c) because first degree rape of a child in violation of N.C. Gen. Stat. § 14-27.2(a)(1) is not an “aggravated offense” as that term is defined in N.C. Gen. Stat. § 14-208.6(1a).

N.C. Gen. Stat. § 14-208.40A(c) provides that a trial court shall require an offender to enroll in lifetime SBM “[i]f the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of [violating N.C. Gen. Stat. § 14-27.2A or N.C. Gen. Stat. § 14-27.4A.]” N.C. Gen. Stat. § 14-208.6(1a) defines an “aggravated offense” as “any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” In light of the plain language of N.C. Gen. Stat. § 14-208.6(1a), “it is clear that an ‘aggravated offense’ is an offense including: first, a sexual act involving vaginal, anal or oral penetration; and second, either (1) that the victim is less than [12] years old or (2) the use of force or the threat of serious violence against a victim of any age.” *State v. Davison*, — N.C. App. —, —, 689 S.E.2d 510, 515 (2009), *disc. review denied*, — N.C. —, 703 S.E.2d 738 (2010). In *Davison*, we held that, in determining whether a defendant’s conviction offense qualifies as an “aggravated offense” for purposes of N.C. Gen. Stat. § 14-208.40A, the trial court is only permitted to consider the elements of the offense for which the defendant has been convicted and “is not to consider the underlying factual scenario giving rise to the conviction.” *Id.* at —, 689 S.E.2d at 517. As a result, “in order for a trial court to conclude that a conviction offense is an ‘aggravated offense’ under [N.C. Gen. Stat. § 14-208.40A,] . . . the elements of the conviction offense must ‘fit within’ the statutory definition of ‘aggravated offense.’” *State v. Phillips*, — N.C. App. —, —, 691 S.E.2d 104, 106 (citing *State v. Singleton*, — N.C. App. —, —, 689 S.E.2d 562, 569, *disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010)), *disc. review denied*, 364 N.C. 439, 702 S.E.2d 794 (2010). In comparing the statutory definition of an “aggravated offense,” as set out in N.C. Gen. Stat. § 14.208.6(1a), with the elements required to be proven to obtain a conviction under N.C. Gen. Stat. § 14.27.2(a)(1) for first degree rape, it is clear that first degree rape “fit[s] within” the

STATE v. CLARK

[211 N.C. App. 60 (2011)]

definition of “aggravated offense” as required by *Davison* and its progeny. *Id.*

N.C. Gen. Stat. § 14-27.2(a)(1) provides that:

A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

- (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

Unlike the various conviction offenses at issue in the cases upon which Defendant relies, *Davison*, — N.C. App. at —, 689 S.E.2d at 516 (taking indecent liberties with a child); *Singleton*, — N.C. App. at —, 689 S.E.2d at 566-67 (taking indecent liberties with a child); *Phillips*, — N.C. App. at —, 691 S.E.2d at 107 (felonious child abuse by means of the commission of any sex act); *Brooks*, — N.C. App. at —, 693 S.E.2d at 207 (sexual battery), as well as other cases recently decided by this Court, *State v. Treadway*, — N.C. App. —, —, 702 S.E.2d 335, 347 (2010) (first degree sexual offense), *State v. Santos*, — N.C. App. —, —, — S.E.2d —, —, 2011 N.C. App. LEXIS 459, at *9-*14 (2011) (first degree sexual offense), obtaining a first degree rape conviction pursuant to N.C. Gen. Stat. § 14-27.2(a)(1) requires proof that a defendant “engage[d] in vaginal intercourse” with his or her victim, as compared to some other form of inappropriate contact. N.C. Gen. Stat. § 14-27.2(a)(1). In other words, anyone found guilty of first degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1) has necessarily “[engaged] in a sexual act involving vaginal, anal, or oral penetration,” N.C. Gen. Stat. § 14-208.6(1a), based solely on an analysis of the elements of the conviction offense.⁴

The fact that a defendant has been convicted of first degree rape under N.C. Gen. Stat. § 14-27.2(a)(1) does not, however, support an inference that the victim was under the age of 12 as required by N.C. Gen. Stat. § 14-208.6(1a)(ii), since one commits first degree rape whenever he or she engages in vaginal intercourse with “a child under the age of 13.” N.C. Gen. Stat. § 14-27.2(a)(1). Thus, as Defendant correctly points out, a trial court cannot determine whether the victim of a first degree rape in violation of N.C. Gen. Stat.

4. The same is not necessarily true with respect to a conviction for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), since an individual can be convicted of first degree sexual offense on the basis of cunnilingus, which does not require proof of penetration. *State v. Ludlum*, 303 N.C. 666, 669, 281 S.E.2d 159, 161 (1981) (stating that “[w]e do not agree, however, that penetration is required before cunnilingus, as that word is used in the statute, can occur”).

STATE v. CLARK

[211 N.C. App. 60 (2011)]

§ 14-27.2(a)(1) was under the age of 12 without engaging in an impermissible consideration of the underlying factual scenario giving rise to the conviction offense. *See Phillips*, — N.C. App. at —, 691 S.E.2d at 108 (stating that, “[s]ince ‘a child less than 16 years’ is not necessarily also ‘less than 12 years old,’ without looking at the underlying facts, a trial court could not conclude that a person convicted of felonious child abuse by the commission of any sexual act committed that offense against a child less than 12 years old”); *Treadway*, — N.C. App. at —, 702 S.E.2d at 33-34 (holding that the record did not support a finding that a defendant convicted of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1) had committed an “aggravated offense,” because a conviction for first degree sexual offense only requires that the victim be under the age of 13, guilt of “[a]n aggravated offense requires that the child be ‘less than 12 years old,’ ” and “a child under the age of 13 is not necessarily also a child less than 12 years old”) (internal citations omitted); *Santos*, — N.C. App. at —, — S.E.2d —, 2011 N.C. App. LEXIS 459, at *12-*13 (2011) (citing *Treadway* for the proposition that first degree sexual offense is not an “aggravated offense”). In sum, the trial court’s determination that Defendant was subject to lifetime SBM based on his conviction for an “aggravated offense” cannot be upheld on the basis of the “child victim” prong of the statutory definition set out in N.C. Gen. Stat. § 14-208.6(1a).

As we previously noted, however, one commits an “aggravated offense” if he or she (1) engages in a sexual act involving vaginal, anal, or oral penetration, with either (2a) a victim less than 12 years old **or**, (2b) a victim of any age through the use of force or the threat of serious violence. N.C. Gen. Stat. § 14-208.6(1a). Based only on the fact that Defendant was convicted of first degree rape in violation of N.C. Gen. Stat. § 14-27.4(a)(1) and without making any reference to the factual scenario giving rise to Defendant’s rape conviction, it is clear from the mere fact of his conviction that Defendant engaged in vaginal intercourse with the victim. In addition, because we believe that the act of vaginal intercourse with a person under the age of 13 necessarily involves the use of force or the threat of serious violence, we find that first degree rape “fit[s] within” the definition of “aggravated offense” as is required by *Davison* and its progeny.

In *State v. Oxendine*, — N.C. App. —, 696 S.E.2d 850 (2010), this Court accepted the State’s argument that “defendant should . . . be required to enroll in lifetime SBM given that he pled guilty to three counts of second-degree rape of a mentally disabled victim, an aggra-

STATE v. CLARK

[211 N.C. App. 60 (2011)]

vated offense as defined by [N.C. Gen. Stat.] § 14-208.6(1a)” and “remand[ed] this matter to the trial court to enter an appropriate order in light of [*State v. McCravey*, — N.C. App. —, 692 S.E.2d 409 (2010)].” *Oxendine*, — N.C. App. at —, 696 S.E.2d at 853, 853-55. As the Supreme Court has noted, “rape is a felony which has as an element the use or threat of violence[.]” *State v. Holden*, 338 N.C. 394, 404, 450 S.E.2d 878, 883-84 (1994) (citations omitted).⁵ In reaching this conclusion, the Supreme Court explicitly “reject[ed] the notion” of “‘non-violent rape’” and endorsed the “more enlightened view . . . expressed in the opinions of military courts which have been cited with approval by this Court.” *Id.* at 405, 450 S.E.2d at 884.

Under the Uniform Code of Military Justice, rape is always, and under any circumstances, deemed as a matter of law to be a crime of violence. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *rev. denied*, 27 M.J. 161 (C.M.A. 1988); *United States v. Myers*, 22 M.J. 649 (A.C.M.R. 1986), *rev. denied*, 23 M.J. 399 (C.M.A. 1987). As stated in *Myers*, military courts “specifically reject the oxymoronic term of ‘non-violent rape.’ The more enlightened view is that rape is always a crime of violence, no matter what the circumstances of its commission.” *Myers*, 22 M.J. at 650. “Among common misconceptions about rape is that it is a sexual act rather than a crime of violence.” *United States v. Hammond*, 17 M.J. 218, 220 n.3 (C.M.A. 1984).

Id. (quoting *State v. Green*, 336 N.C. 142, 169, 443 S.E.2d 14, 30, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547, 115 S. Ct. 642 (1994)). Thus, “[t]he act[] of having . . . sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting—just as with a person who refuses to consent—involve[s] the ‘use or threat of violence.’” *Id.* at 406, 450 S.E.2d at 884. Put another way, an act of sexual intercourse with a person deemed incapable of consenting as a matter of law is a violent act. *Id.* As a result, since a child under the age of 13 is inherently incapable of consenting to sexual intercourse, the rape of such a victim necessarily involves “the use of force or the threat of serious violence[.]” N.C. Gen. Stat. § 14-208.6(1a).

Thus, based on an examination of the elements of the offense of first degree rape as defined in N.C. Gen. Stat. § 14-27.2(a)(1), the trial court had ample basis for determining that Defendant committed an

5. The logic adopted in our opinion with respect to this issue is essentially the same as that advocated by Judge Stroud in her concurring opinion in *Oxendine*.

STATE v. CLARK

[211 N.C. App. 60 (2011)]

act involving vaginal penetration. Additionally, in light of *Holden*, it is clear that, without considering the facts of the underlying event giving rise to Defendant's conviction, the trial court had ample basis for concluding that Defendant engaged in "a sexual act involving . . . the use of force or the threat of serious violence[.]" N.C. Gen. Stat. § 14-208.6(1a). Since neither *Treadway* nor *Santos* addressed the extent to which the defendant was subject to lifetime SBM on the basis of the "violent conduct" prong of N.C. Gen. Stat. § 14-208.6(1a), and since guilt of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1) does not require proof of an act of "vaginal, anal, or oral penetration," N.C. Gen. Stat. § 14-208.6(1a), those decisions do not control the outcome in this case. Instead, our decision with respect to this issue is controlled by *Oxendine*, in which we held that a defendant convicted of any rape was subject to lifetime SBM on the basis of the "violent conduct" prong of N.C. Gen. Stat. § 14-208.6(1a). Since the essential elements of first degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1) "fit within" the statutory definition of an "aggravated offense" set out in N.C. Gen. Stat. § 14-208.6(1a), we hold that the trial court did not err by ordering Defendant to enroll in SBM for the remainder of his natural life pursuant to N.C. Gen. Stat. § 14-208.40A.

3. Ineffective Assistance of Counsel

[4] Finally, Defendant contends that he was denied the effective assistance of counsel in violation of the United States Constitution and the North Carolina Constitution. U.S. Const. amend. VI; N.C. Const. art. I, § 23. More specifically, Defendant contends that he received deficient representation because his trial counsel failed to challenge the trial court's SBM order on the grounds that it violated the federal and state constitutional prohibitions against the enactment of *ex post facto* laws. U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. Defendant is not entitled to relief on appeal based upon this contention.

We first note that this ineffective assistance claim is simply not available to Defendant. "[I]neffective assistance of counsel [claims are] available only in criminal matters." *State v. Wagoner*, — N.C. App. —, —, 683 S.E.2d 391, 400 (2009), *aff'd* 364 N.C. 422, 700 S.E.2d 222 (2010). The SBM statutes constitute a civil, regulatory regime, rather than a criminal punishment. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) (stating that "[t]he SBM program . . . was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist

STATE v. CLARK

[211 N.C. App. 60 (2011)]

tendencies of convicted sex offenders” and “neither the purpose nor effect of the SBM program negates the legislature’s civil intent[,]” so that “subjecting defendants to the SBM program does not violate the Ex Post Facto Clauses of the state or federal constitution”). As a result, since an SBM proceeding is not criminal in nature, defendants required to enroll in SBM are not entitled to challenge the effectiveness of the representation that they received from their trial counsel based on the right to counsel provisions of the federal and state constitutions. *Wagoner*, — N.C. App. at —, 683 S.E.2d at 400.

Moreover, even if Defendant were entitled to raise an ineffective-assistance claim, that claim would not be successful. A successful ineffective assistance of counsel claim requires a demonstration that the representation that the defendant received “fell below an objective standard of reasonableness” and that the “deficiencies in counsel’s performance [were] prejudicial[.]” *Strickland v. Washington*, 466 U.S. 668, 688, 692, 80 L. Ed. 2d 674, 693, 696, 104 S. Ct. 2052, 2064, 2067 (1984). In other words, a mere demonstration that a defendant’s trial counsel provided deficient representation is insufficient to support an award of relief. *Id.* at 693, 80 L. Ed. 2d at 697, 104 S. Ct. at 2067. Instead, Defendant must also show that there is a “reasonable probability” that, had his trial counsel challenged the trial court’s SBM order on *ex post facto* grounds, “the result of the proceeding would have been different.” *Id.* at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068. In light of the Supreme Court’s recent *Bowditch* decision, it is clear that any *ex post facto* challenge that Defendant might have advanced in opposition to the trial court’s SBM order would not have been successful. Thus, for all of these reasons, Defendant’s ineffective assistance of counsel claim lacks merit.

IV. Conclusion

Thus, for the reasons set forth above, we conclude that Judge Hardin did not err by denying Defendant’s suppression motion and that the trial court did not err by ordering Defendant to enroll in SBM for the remainder of his natural life. As a result, the trial court’s judgment and the SBM order should not, and will not be, disturbed on appeal.

NO ERROR.

Judges BRYANT and STEELMAN concur.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

ELIZABETH BRUCE STRATTON, PLAINTIFF v. ROYAL BANK OF CANADA, DEFENDANT

No. COA10-489

(Filed 19 April 2011)

**Declaratory Judgments— rightful owner of common stock—
expiration of statute of limitations—laches**

The trial court did not err by granting defendant RBC's motion for summary judgment in a suit seeking declarative and compensatory relief claiming that plaintiff was the rightful owner of at least 14,486 shares of RBC common stock. The applicable statute of limitations and the doctrine of laches barred plaintiff's claims.

Appeal by Plaintiff from opinion and order entered 5 February 2010 by Judge John R. Jolly, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 November 2010.

McDaniel & Anderson, L.L.P., by L. Bruce McDaniel, for Plaintiff-appellant.

Poyner Spruill, LLP, by John W. O'Hale and David Dreifus, for Defendant-appellee.

HUNTER, JR., Robert, N., Judge.

Elizabeth Stratton is the sole heir to her mother's estate. Several years after her mother's death, she discovered a Bank of Manteo stock certificate, which had belonged to her mother, in a closet (the "Stock Certificate"). The Bank of Manteo is a predecessor corporation to RBC Centura Banks, Inc., which is owned by the Royal Bank of Canada ("RBC"). Years after discovering the Stock Certificate, Ms. Stratton brought suit seeking declarative and compensatory relief, claiming she is the rightful owner of at least 14,486 shares of RBC common stock. The trial court granted RBC's motion for summary judgment. We affirm because the trial court correctly concluded the applicable statute of limitations and the doctrine of laches bar Ms. Stratton's claims.

I. Factual and Procedural Background

In 1927, Matilda Ethridge, who later changed her surname to "Inge" ("Ms. Inge"), purchased five shares of stock in the Bank of Manteo, represented by certificate number 86. She lived in Manteo,

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

North Carolina for most of her life. In 1933, Ms. Inge was listed as a shareholder on a Bank of Manteo document entitled “Stockholders Assent to Change.” This is the most recent known documentary evidence of Ms. Inge owning RBC shares or shares of any of RBC’s predecessors.

In 1962, the Bank of Manteo merged into Planters National Bank and Trust Company (“Planters Bank”). Two and eight-tenths shares of Planters Bank stock were issued for every one share of Bank of Manteo stock. According to a document filed with the United States Treasury Department, about two years before the merger occurred, Ms. Inge and approximately 600 other people lived in Manteo on a year-round basis; there were 800 “seasonal” residents. Ms. Stratton, who is Ms. Inge’s daughter, was attending college at the time of the merger. She was banking with Bank of Manteo at the time and learned Planters Bank had subsumed the Bank of Manteo when she received a new checkbook bearing the Planters Bank name. According to a Bank of Manteo “stockholder list,” the bank did not recognize Ms. Inge as a shareholder at the time it merged with Planters Bank.

Ms. Inge died in 1980. She was survived by Ms. Stratton, who served as the executrix of her estate. In 1982, Ms. Stratton discovered the original 1927 Stock Certificate in a closet. According to Ms. Stratton, Ms. Inge had been private with respect to her finances, and Ms. Stratton was unaware of Ms. Inge’s financial transactions during her life. When serving as executrix, Ms. Stratton did not list in her estate accountings the Stock Certificate as property of the Inge estate.

In 1984 or 1985, Ms. Stratton asked a Planters Bank employee in Manteo to allow her to review a book of historical Bank of Manteo stock certificates. She was permitted to review the book, but did not inform the employee about the Stock Certificate. In 1985, Ms. Stratton asked a stockbroker to give her information about the stock. He told her “just to leave it alone,” so she assumed the stock had value and continued to hold it. In 1985 or 1986, after an inquiry by Ms. Stratton’s husband concerning what Ms. Stratton should do with the stock, a Manteo attorney told Ms. Stratton’s husband he did not have time to handle the request for advice. Ms. Stratton was aware of this conversation. In 1986 or 1987, Ms. Stratton sought advice from a law firm in Elizabeth City. She paid the firm a retainer, but apparently chose not to pursue the matter any further at that time.

In 1990, the Planters Corporation merged with Peoples Bancorporation to form Centura Banks, Inc. Shareholders received

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

new stock in Centura on the basis of a one-for-one exchange. In 2001, RBC indirectly acquired Centura Banks, Inc. with 1.684 shares of RBC stock issued for each share of Centura Banks, Inc. stock. RBC Centura Banks, Inc. is now a wholly-owned subsidiary of RBC.

In 2003, Ms. Stratton asked her stepson whether he would look into the Stock Certificate. On or about September 8, 2006, RBC Centura Banks, Inc. refused Ms. Stratton's request for replacement stock certificates, unpaid stock, and unpaid dividends.¹

On 20 September 2007, Ms. Stratton filed suit against RBC² seeking the following: (1) a declaratory judgment against RBC to the effect that Ms. Stratton is the owner of at least 14,486 shares of RBC common stock and any additional shares to which she might be entitled by virtue of accretion, stock dividends, and stock splits; (2) an order commanding RBC to issue those shares to her; and (3) recovery from RBC of any money dividends to which she would be entitled through these shares. RBC filed a motion for summary judgment. Ms. Stratton's memorandum in response to RBC's motion states the non-declaratory relief she is seeking is premised on two causes of action: conversion and unjust enrichment. That memorandum and Ms. Stratton's appellate brief suggest these claims are also premised on a "mistake" made by RBC, although the inner-workings of and legal support for this theory are not articulated.

In a detailed opinion, the trial court held (1) the doctrine of laches barred Ms. Stratton from seeking declaratory relief insofar as Ms. Stratton did not rely on a constructive trust theory; (2) the statute of limitations barred Ms. Stratton from seeking relief through a constructive trust theory; (3) the statute of limitations barred Ms. Stratton's conversion claim; and (4) the statute of limitations barred Ms. Stratton's unjust enrichment claim. The trial court granted RBC's motion for summary judgment. Ms. Stratton gave timely notice of appeal.

II. Jurisdiction

We have jurisdiction over Ms. Stratton's appeal of right. *See* N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal lies of right to this Court from final judgments of a superior court).

1. The record does not disclose the precise date on which Ms. Stratton made her initial demand.

2. Ms. Stratton originally filed suit against RBC Centura Banks, Inc. By consent, RBC was substituted as the proper party defendant.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

III. Analysis

Summary judgment rulings are reviewed *de novo*. *Coastal Plains Utils. v. New Hanover Cnty.*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004). A trial court shall grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. R. Civ. P. 56(c). The court is required to view the evidence in the light most favorable to the non-moving party. *Perry v. Presbyterian Hosp.*, — N.C. App. —, —, 703 S.E.2d 850, 853 (2011).

On appeal, Ms. Stratton argues the trial court erred in granting summary judgment in favor of RBC regarding each of her claims for relief. We address her conversion and unjust enrichment claims, her declaratory judgment claim, and the viability of a constructive trust in turn.³

A. Ms. Stratton’s Conversion and Unjust Enrichment Claims

Ms. Stratton argues the trial court incorrectly held section 1-52, the applicable statute of limitations, bars her conversion and unjust enrichment claims. We disagree.

After a defendant pleads the statute of limitations, the plaintiff has the burden of demonstrating she brought the action within the applicable limitation period. *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974). Whether a claim is time-barred is a mixed question of law and fact. *Id.* Summary judgment is an appropriate means of resolving this question if there are no genuine issues of material fact. *Id.*

In her memorandum in response to RBC’s motion for summary judgment, Ms. Stratton listed three causes of action: declaratory judgment, conversion, and unjust enrichment (these claims are not articulated with specificity in her complaint). She argues her non-declaratory claims for relief are premised on a “mistake.” Therefore, she contends, subsection 9 of section 1-52, which applies to claims seeking “relief on the ground of fraud or mistake,” N.C. Gen. Stat. § 1-52(9) (2009), provides the applicable limitation period, rather than the subsections that typically apply to unjust enrichment and conversion claims.⁴

3. Neither party argues they are not bound by the conduct of their predecessor(s) in interest.

4. When arguing that her claims for relief should be based on “mistake,” Ms. Stratton, in passing, raises the possibility that these claims *might* also be premised on fraud. Her brief’s discussion of fraud is limited to the following statement: “Here, [the

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

Whether this proves correct is critical because the “discovery rule” applies to subsection 9. The discovery rule tolls the statute of limitations until the aggrieved party discovers or, through the exercise of reasonable diligence, should discover the mistake. *Lee v. Rhodes*, 231 N.C. 602, 602, 58 S.E.2d 363, 363 (1950) (per curiam). It is unclear when Ms. Inge or Ms. Stratton knew of the grounds for their claims. And when a party *should have* discovered the grounds for a claim is *generally* a jury question (making summary judgment inappropriate). See, e.g., *id.* at 603, 58 S.E.2d at 364 (“The evidence of the respective parties as shown in the record of case on appeal is in conflict, thus presenting a question for the jury . . .”); *N.C. Nat’l Bank v. Carter*, 71 N.C. App. 118, 124, 322 S.E.2d 180, 184 (1984) (stating this principle in the context of a fraud claim). Therefore, we first address whether subsection 9 and the discovery rule are applicable.

According to Ms. Stratton, the “mistake” was RBC’s “grossly negligent paperwork” through which it “lost . . . [P]laintiff and/or her predecessor as the owner of the stock certificate.” However, Ms. Stratton misconstrues the term of art “mistake,” which applies to the reformation or rescission of a contract or deed. A party seeking relief from a contract or deed must generally prove there was a *mutual* mistake by the parties. E.g., *Smith v. First Choice Servs.*, 158 N.C. App. 244, 249, 580 S.E.2d 743, 748 (2003). That mistake must occur during the making of the contract. See *Smith*, 158 N.C. App. at 249, 580 S.E.2d at 748 (“A mutual mistake exists when both parties to a contract proceed ‘under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement.’” (quoting *Sudds v. Gillian*, 152 N.C. App. 659, 662, 568 S.E.2d 214, 217 (2002))). Ms. Stratton is *not* seeking relief from a transaction (entered into by Ms. Inge and an RBC predecessor) that is infected by mutual mistake.

Rather, it appears that, in order to secure a more favorable limitation period, she is clothing her claim for relief with the word “mistake” when she is in essence pursuing a conversion claim. In other words, she claims an RBC predecessor negligently, albeit unintentionally, converted her stock. She assumes subsection 9 applies merely because RBC made an error, but cites no authority for her

basis for the causes of action] should principally be ‘mistake’ though if the bank wants to have it considered as fraud, the plaintiff would have no objection.” “The bank,” i.e., RBC, responds that it has no desire for this Court to consider fraud as a basis for Ms. Stratton’s claims. Therefore, we do not consider whether fraud can be coupled to Ms. Stratton’s causes of action in order to secure a more favorable limitation period.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

interpretation of subsection 9 or her theory of recovery. *See* N.C. R. App. P. 28(b)(6) (requiring “citations of the authorities upon which the appellant relies”). Our research yields no North Carolina decision applying the statute in this manner. On the other hand, there are ample cases indicating subsection 9 applies to the doctrine of mutual mistake, *e.g.*, *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 655, 273 S.E.2d 268, 272-73 (1981), which is not applicable here. We conclude subsection 9 and the discovery rule do not apply to Ms. Stratton’s conversion and unjust enrichment claims.⁵

We now turn to whether the torts of conversion and unjust enrichment are barred by the applicable limitation periods. A conversion is “an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner’s rights.” *Peed v. Burleson’s, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (internal quotation marks omitted). Conversion claims are subject to a three-year limitation period under subsection 4. N.C. Gen. Stat. § 1-52(4). As a general rule, the claim accrues, and the statute of limitations begins to run, when the unauthorized assumption and exercise of ownership occurs—not when the plaintiff discovers the conversion. *See, e.g.*, *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 309-11, 603 S.E.2d 147, 165-66 (2004) (concluding statute of limitations runs from the date of conversion, rather than discovery). However, when the defendant *lawfully* obtains possession or control and *then* exercises unauthorized dominion or control over the property, demand and refusal become necessary elements of the tort. *Hoch v. Young*, 63 N.C. App. 480, 483, 305 S.E.2d 201, 203 (1983) (quoting William L. Prosser, *The Law of Torts*, § 16, at 89-90 (4th ed. 1971)); *see also Trustees of Univ. of N.C. v. State Nat’l Bank*, 96 N.C. 280, 285-86, 3 S.E. 359, 361 (1887) (“In the case of a conversion by wrongful taking it is not necessary to prove a demand and refusal. So the wrongful assumption of the property and right of disposing of goods may be a *conversion in itself*, and render a demand and refusal unnecessary.” (quoting 1 Joseph Chitty, *Chitty’s Treatise on Pleading and Parties to Actions* 153 (1879))).

Ms. Stratton maintains the demand-and-refusal rule applies to this case and that accrual did not occur until 8 September 2006, when RBC Centura Banks, Inc. refused Ms. Stratton’s request for replace-

5. The parties do not address the implications of the possibility that the stock escheated to the State and falls under a presumption of abandonment. *See* N.C. Gen. Stat. § 116B-53 (2009) (addressing the “presumptions of abandonment”). Therefore, we do not address this issue.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

ment stock certificates, unpaid stock, and unpaid dividends. (This would bring Ms. Stratton's claim within the statute of limitations.) She argues this case is analogous to our decision in *Hoch v. Young*. There, the plaintiff originally gave the stock certificates, which were endorsed in blank, to a third party, who agreed to hold them in trust. *Hoch*, 63 N.C. App. at 481, 305 S.E.2d at 202. The defendant came into lawful possession of the plaintiff's stock certificates, although it is not clear how he acquired them from the third party. *See id.* at 482-83, 305 S.E.2d at 203. This Court applied the demand-and-refusal rule, holding that the jury could have properly found the defendant converted the stock when he refused to return the certificates. *Id.* at 483-84, 305 S.E.2d at 204.

In this case, however, Ms. Stratton has not alleged RBC gained lawful possession of her stock before converting it. Rather, her case relies on the allegation that neither RBC nor any third party purchased the stock from Ms. Inge. It is doubtful that an RBC predecessor could exercise control over the stock without actually converting it. In other words, the bank could not exercise lawful control over the stock, under these facts, prior to the *wrongful* exercise of control. Any assertion of ownership over the stock by RBC would be unlawful at the time the assertion first occurred. *See White*, 166 N.C. App. at 309-11, 603 S.E.2d at 165-66 (conversion occurred at the moment one defendant withdrew funds from plaintiffs' annuity without plaintiffs' permission; defendants' management of annuity fund did not equate to obtaining lawful possession before conversion). Consequently, the demand-and-refusal rule does not apply.

While the precise moment when an RBC predecessor exercised control over the stock cannot be ascertained at the summary judgment phase, we can determine the last possible date on which the conversion could have occurred. As our Supreme Court explained, "[i]t is the act of subscribing, or the registry of the stockholder's name upon the stock book" that gives the stockholder legal title to the stock. *Powell Bros. v. McMullan Lumber Co.*, 153 N.C. 52, 55, 68 S.E. 926, 927 (1910) (internal quotation marks omitted); *cf. Marzec v. Nye*, — N.C. App. —, —, 690 S.E.2d 537, 541 (2010) (noting that, while *Powell Bros.* and other decisions are dated, they are still the law in this state). While RBC was unable to produce a stock ledger, it did provide a Bank of Manteo "stock list" indicating there were 7084 outstanding shares. Ms. Inge is not listed as a shareholder. The Bank of Manteo-Planters Bank merger document states there were 7084 shares at the time of

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

the merger. This indicates the Bank of Manteo did not recognize Ms. Inge as a shareholder in 1962, when the merger occurred.

Ms. Stratton objects to the use of the stock list for reaching this conclusion because it is “incomplete, misleading, and distorted.” We disagree with this characterization. In making this assertion, Ms. Stratton references her stepson’s affidavit, in which he points out that the stock list does not indicate when the list was made and who made it, among other things. He also avers that several certificates referenced by the document are not dated correctly. The “Stockholders Assent to Change” document, which indicated Ms. Inge was a shareholder, and was prepared in 1934, showed there were 142 outstanding shares at the time. Based on the increase in the number of Bank of Manteo shares, the stock list was clearly prepared after the “Stockholders Assent to Change” document, indicating Ms. Inge had previously been, but no longer was, a shareholder when the stock list was created. We believe the other irregularities do not raise a genuine issue of fact concerning whether the Bank of Manteo considered Ms. Inge to be a shareholder on the date of the merger. Furthermore, Ms. Stratton has forecasted no evidence suggesting the Bank of Manteo *did* consider her a shareholder at that time.

We conclude that, if RBC or one of its predecessors converted Ms. Inge’s shares (possibly by re-selling them), it would have done so no later than 1962, when the merger occurred. Ms. Stratton has failed to meet her burden of establishing she brought her conversion claim within the statute of limitations.

A claim for unjust enrichment must be brought within three years of accrual under subsection 1 of section 1-52. *Housecalls Home Health Care, Inc. v. State*, — N.C. App. —, —, 682 S.E.2d 741, 744 (2009) (citing N.C. Gen. Stat. § 1-52(1), (4)). Ms. Stratton contends the trial court’s ruling on her unjust enrichment claim suffers from the same malady as the court’s ruling on her conversion claim—namely, the claim did not accrue until demand and refusal. But she fails to point us to any case law suggesting the demand-and-refusal rule applies to unjust enrichment claims, or that the rule would apply differently than it does to conversion claims. *See* N.C. R. App. P. 28(b)(6) (requiring “citations of the authorities upon which the appellant relies”). We conclude her unjust enrichment claim could have accrued no later than 1962. Consequently, she failed to bring her claim within the time required by statute.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

Ms. Stratton further maintains that, despite the foregoing analysis, the “continuing wrong doctrine” saves her conversion and unjust enrichment claims from the statute of limitations. The continuing wrong doctrine is an exception to the general rule that a cause of action accrues as soon as the plaintiff has the right to sue. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003); *see also Marzec*, — N.C. App. at —, 690 S.E.2d at 542 (“Under the continuing wrong doctrine, the statute of limitations does not start running ‘until the violative act ceases.’” (quoting *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008)) (internal quotations marks omitted)). However, in order for the continuing wrong doctrine to toll the statute of limitations, the plaintiff must show “[a] continuing violation” by the defendant that “is occasioned by continual unlawful acts, *not by continual ill effects from an original violation.*” *Marzec*, — N.C. App. at —, 690 S.E.2d at 542 (alteration in original) (internal quotation marks omitted). When a court determines whether the doctrine applies, it should consider “[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged.” *Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)).

Ms. Stratton argues the doctrine applies because RBC has continually deprived her of shareholder rights, including her right to stock and cash dividends. We disagree.

We recently held the “continuing wrong” doctrine applied in *Marzec v. Nye*, where the defendant allegedly failed to pay the plaintiff’s salary on a monthly basis. — N.C. App. at —, 690 S.E.2d at 543-54. There, it appears the parties had a continuing, albeit severely strained, business relationship, but at no point was the plaintiff’s employment expressly terminated. *Id. passim*. The doctrine also tolled the statute of limitations in *Babb v. Graham*, where the trustee continuously refused to make distributions to the trust beneficiaries. 190 N.C. App. at 481, 660 S.E.2d at 637 (2008). The trustee did not convert the entire trust for his own purposes; rather, he continuously refused to make distributions for reasons unrelated to the trust. *Id.* at 477, 660 S.E.2d at 635. Unlike in *Marzec* and *Babb*, the continuing wrongs alleged in this case—the deprivation of shareholder rights and nonpayment of dividends—are clearly the continual ill effects of one antecedent wrong: the alleged conversion of Ms. Stratton’s stock. Our readings of *Marzec* and *Babb* disclose no such clear-cut wrong precipitating the subsequent injuries to the plaintiffs in those cases.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

As the Seventh Circuit has explained, the continuing wrong doctrine is premised, at least in part, on the idea that where a cause of action arises from the cumulative nature or impact of a series of acts that occur over time, it can be difficult for the plaintiff to discern at any particular point during that time the wrongful and injurious nature of the defendant's conduct.

Rodrigue v. Olin Emp. Credit Union, 406 F.3d 434, 445 (7th Cir. 2005); *cf. Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (citing numerous federal opinions as persuasive in this area of law). The conversion of Ms. Stratton's stock was a discrete occurrence—not a cumulative one—that should have been discovered through reasonable diligence. That the precise moment of conversion may be difficult to discover does not change our calculus. And even though Ms. Inge may not have been on immediate notice of the conversion, this does not justify remaining idle for several decades. At some point shortly after the stock conversion, it should have become obvious to Ms. Inge she was no longer a shareholder. Applying the continuing wrong doctrine under these facts would discourage shareholders from promptly investigating and litigating stock conversion claims, thereby defeating the policy objectives advanced by statutes of limitations.

This leads us to three conclusions: (1) the continued deprivation of shareholder rights and nonpayment of dividends were not continual violations, but rather "continual ill effects" of the conversion; (2) policy considerations militate against applying the continuing wrong doctrine; and therefore, (3) the trial court correctly ruled that the doctrine does not apply.

Ms. Stratton also argues the doctrine of equitable estoppel bars RBC from asserting statutes of limitations defenses. We disagree.

"[A] defendant may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998) (citing *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987)). The jury must resolve factual disputes pertaining to the elements of equitable estoppel. *Id.* at 809, 509 S.E.2d at 798. However, when there is no genuine issue of material fact, the question of estoppel is one for the court. *White*, 166 N.C. App. at 305, 603 S.E.2d at 162.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Friedland, 131 N.C. App. at 807, 357 S.E.2d at 796-97 (quoting *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990)). “[N]either bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied.” *Id.* (quoting *Parker*, 100 N.C. App. at 371, 396 S.E.2d at 629) (“iteration in original”). The party invoking equitable estoppel has the burden of pleading sufficient facts to satisfy the elements. *Id.*

Ms. Stratton maintains the trial court incorrectly ruled she could not rely on the doctrine for two reasons. First, she argues the doctrine applies because RBC failed to comply with statutorily mandated record-keeping requirements. *See* N.C. Gen. Stat. § 53-100 (2009) (requiring banks to maintain certain records). Second, she argues there are genuine issues of material fact related to the doctrinal elements—specifically, what Ms. Inge and Ms. Stratton knew and when they knew it. However, even if knowledge and reliance hinge on disputed facts, Ms. Stratton has failed to forecast evidence indicating RBC made a false representation or concealed material facts. Nor does she point us to any evidence that RBC intended for her to rely on any such misrepresentation or concealment.

While we recognize RBC’s alleged record-keeping errors may have harmed Ms. Stratton, equitable estoppel is not premised on a relative scale of blameworthiness. A party cannot use it to bypass a statutory limitation defense without satisfying its doctrinal elements. Our review indicates the trial court properly ruled as a matter of law that Ms. Stratton could not rely on the doctrine to overcome RBC’s statute of limitations defense.

B. Ms. Stratton’s Declaratory Judgment Claim

Ms. Stratton argues the trial court improperly concluded she and Ms. Inge were guilty of laches. We disagree.

The doctrine of laches is “designed to promote justice by preventing surprises through the revival of claims that have been

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49, 88 L. Ed. 788, 792 (1944). It is an appropriate defense to Ms. Stratton’s claim for declaratory judgment. *See, e.g., Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976) (“proving the assertion of the doctrine of laches in declaratory relief proceedings because they resemble equitable proceedings); *cf. Richmond Cedar Works v. John L. Roper Lumber Co.*, 168 N.C. 391, 395, 84 S.E. 521, 522 (1915) (observing that “laches are often a defense wholly independent of the statute of limitations.” (quoting *Simmons v. Burlington, C.R. & N.R. Co.*, 159 U.S. 278, 292, 40 L. Ed. 150, 155 (1895))). Determining whether Ms. Stratton’s claim is barred by laches requires us to consider two questions: (1) whether the pleadings, affidavits, and exhibits show any dispute as to the facts upon which RBC relies to show Ms. Stratton is guilty of laches; and (2) if not, whether the undisputed facts, if true, establish laches. *Taylor*, 290 N.C. at 621, 227 S.E.2d at 584. The burden of proof rests with the party pleading laches as a defense. *Id.* at 622, 227 S.E.2d at 584. An adverse party may not, however, rely on her complaint alone to establish a genuine issue of material fact; she “must set forth specific facts showing that there is a genuine issue for trial” by affidavits or other means authorized by North Carolina Rule of Civil Procedure 56. *Id.*

To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

Farley v. Holler, 185 N.C. App. 130, 132-33, 647 S.E.2d 675, 678 (2007) (quoting *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001)).

Our review indicates Ms. Stratton was not justified in failing to bring suit in a timely fashion. After discovering the Stock Certificate, she examined historical Bank of Manteo stock certificates at Planters

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

Bank. She did not, however, mention her mother's stock to anyone at the bank. Shortly thereafter, she met with her stockbroker and several attorneys regarding the value of the stock. These consultations occurred in 1987 at the latest—almost twenty years before Ms. Stratton communicated a demand to RBC. While she was informed it would take a large sum of money to investigate the matter by one attorney, and that she should “leave the matter alone” by a stockbroker, we fail to see why this justified such a lengthy delay.

Ms. Stratton's unjustified delay prejudiced RBC, which is currently unaware of any living person who has material information concerning the Stock Certificate. The lengthy delay likely contributed to the lack of documentary evidence. Ms. Stratton contends RBC was not prejudiced and was actually *benefited* by the delay because RBC converted her stock. She misunderstands the “prejudice element” of the laches doctrine. It does not relate to whether a party was prejudiced by the underlying cause of action. Rather, it refers to whether a defendant has been prejudiced in its ability to defend against the plaintiff's claims by the plaintiff's delay in filing suit.

Ms. Stratton also maintains summary judgment was inappropriate because the parties dispute whether she subjectively knew a cause of action was available to her. She is correct that much of our case law, including the passage quoted above, suggests Ms. Stratton must have actual knowledge of the grounds for her declaratory judgment claim in order for laches to apply. However, a party may be charged with constructive knowledge of the grounds for her claim when it is clear that a party had ample notice of those grounds. *See Save Our Sch. of Bladen Cnty., Inc. v. Bladen Cnty. Bd. of Educ.*, 140 N.C. App. 233, 236-37, 535 S.E.2d 906, 909 (2000) (charging plaintiff with knowledge of the grounds for its claim).

The trial court correctly charged Ms. Stratton with knowledge of the grounds for her claim. Documentary evidence suggests the year-round population of Manteo was about 600 people when the Bank of Manteo-Planters Bank merger occurred. The merger was publicized in an article on the front page of the *Coastland Times*, Manteo's only newspaper, and an advertisement accompanied the article on another page. The Bank of Manteo was the only bank in Manteo when the merger occurred. Ms. Inge, who was highly educated, resided in Manteo for all but a few years of her life. She was exposed to ample evidence of the merger and of the grounds for a claim when she was not compensated for her Bank of Manteo stock.

STRATTON v. ROYAL BANK OF CANADA

[211 N.C. App. 78 (2011)]

It would also be proper to charge Ms. Stratton with knowledge of the grounds for her claim—irrespective of what Ms. Inge knew. Ms. Stratton received a new checkbook from Planters Bank in the mid-1960s informing her that her Manteo Bank account had become a Planters Bank account. Ms. Stratton discovered the Stock Certificate following her mother's death; however, when closing her mother's estate while serving as executrix, Ms. Stratton did not list the stock as an estate asset because she felt it had little value. Ms. Stratton knew the Bank of Manteo merged with Planters Bank. After her visit to Planters Bank to view the historical stock certificates, Ms. Stratton knew that, at some point, her mother owned stock in a predecessor to Planters Bank. She knew Ms. Inge did not have a Planters Bank stock certificate. It was also apparent that dividends or stockholder correspondence were not arriving for Ms. Inge after her death. This is clear indicia that Planters Bank did not view Ms. Inge as a shareholder.

When she learned substantial investigation was needed upon inquiring into the stock value, it should have become all the more apparent that the question of stock ownership was a complex, potentially contested matter that could only become more difficult to untangle as a result of further delay. It was only through Ms. Stratton's failure to bring the issue to the attention of Planters Bank that she failed to gain actual knowledge that Planters Bank did not view her mother as a shareholder. We conclude Ms. Inge and Ms. Stratton had ample notice of the grounds for their claim. Ms. Stratton slept on her rights for at least twenty years. Both Ms. Inge and Ms. Stratton negligently failed to assert their rights, assuming they had any, and RBC was prejudiced as a result. To rule otherwise would encourage shareholders to sleep on their rights by insisting they had no subjective knowledge that they could bring suit. The trial court correctly concluded laches barred Ms. Stratton's claim for declaratory relief.

C. Constructive Trust

Finally, Ms. Stratton argues the trial court incorrectly concluded it could not impose a constructive trust on RBC's assets because the remedy was barred by the applicable statute of limitations. We disagree.

Generally, an action seeking a constructive trust must be commenced no more than ten years after the wrong giving rise to the trust occurs. *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 87-88 (1938); *Laster v. Francis*, — N.C. App. —, —, 681 S.E.2d 858, 861 (2009); *see also* N.C. Gen. Stat. § 1-56 (2009) (stating that claims for relief not covered by other limitation periods “may not be com-

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

menced more than 10 years after the cause of action has accrued”). But where fraud or mistake forms the basis for imposing the constructive trust, the limitation period applicable to fraud and mistake controls. *See J. Lee Peeler & Co. v. Makepeace*, 96 N.C. App. 118, 119-20, 384 S.E.2d 283, 283-84 (1989). Ms. Stratton contends that, because a “mistake” deprived her of her stock, the statute did not begin to run until she discovered the mistake. Again, Ms. Stratton cites no authority for the proposition that a bookkeeping error sounding in negligence should be subject to the discovery rule embodied in section 1-52, subsection 9. *See* N.C. R. App. P. 28(b)(6) (requiring “citations of the authorities upon which the appellant relies”). We reject this argument for the same reasons expressed in Part III.A *supra*.

Because the conversion of Ms. Inge’s stock could have occurred no later than 1962, *supra* Part III.A, we conclude the trial court properly determined Ms. Stratton’s lawsuit is barred by the ten-year limitation period contained in section 1-56 insofar as it relies on the imposition of a constructive trust.

IV. Conclusion

For the foregoing reasons, the decision of the trial court is Affirmed.

Judges STEELMAN and STEPHENS concur.

ROGER SUTTON AND TERRI SUTTON, PLAINTIFFS v. WAYNE DRIVER, JOHN VANN PARKER, JR., JOHN VANN PARKER, ROY K. PARKER, COASTLAND REALTY, INC., CENTURY 21 COASTLAND REALTY, INC., BLOCK 39, LLC, BP2, INC., HENRY L. REAVES, JR., AND SUSAN A. REAVES, DEFENDANTS

No. COA10-82

(Filed 19 April 2011)

1. Brokers— dual brokerage planned adjacent development— duty to disclose

In a coastal real estate sale involving a dual brokerage, the broker had a duty to make a full and truthful disclosure to plaintiffs of all material facts known to the broker or discoverable by the broker with reasonable diligence, with a non-disclosed fact being material when it would have influenced the parties’ decision in entering the

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

contract. The property in this case had an unobstructed view of the ocean over an undeveloped tract that would soon be developed by the owners of the real estate agency and others.

2. Real Estate— fraud and negligent misrepresentation— development of adjacent tract

Summary judgment should not have been granted for a real estate brokerage and its owners on fraud and negligent misrepresentation claims where the brokerage sold coastal property with a view of the ocean over an adjacent tract without disclosing that the brokerage owners and others were planning the development of the adjacent tract.

3. Fraud— sale of real estate—future adjacent development not disclosed

The trial court properly granted summary judgment for a real estate broker on a claim for fraud where the broker sold plaintiffs a coastal property with an unimpeded view of the ocean across a property that was about to be developed by the owners of the real estate agency. Plaintiffs pointed to no evidence that the broker was aware of the agency owner's actions and did not explain how the broker's actions constituted fraud rather than negligence.

4. Real Estate— negligent misrepresentation—failure to disclose planned adjacent development

The trial court should not have granted summary judgment for a real estate broker on a negligent misrepresentation claim arising from the sale of coastal property with a view of the ocean that was about to be obstructed by a development in which the real estate agency's owners were participating. The broker did not speak to the owner of the agency about the possible development of the adjacent property; it was for the jury to decide why he did not do so and whether he failed to act with reasonable diligence.

5. Unfair Trade Practices— real estate sale—undisclosed information

Summary judgment for the owners of a real estate brokerage and a broker on an unfair and deceptive practices claim arising from the sale of coastal land with an ocean view was reversed where the owners of the brokerage were involved in a project to develop adjacent land that would block the ocean view. A claim of unfair and deceptive trade practice can be established against realtors by proving either fraud or negligent misrepresentation in a commercial setting.

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

6. Real Estate— undisclosed information—liability of sellers

Summary judgment against the sellers of coastal property was reversed on claims of fraud and negligent misrepresentation because the principal is liable for the fraudulent acts of his real estate agent. However, summary judgment for the sellers was affirmed on a claim of unfair and deceptive trade practice because they did not become realtors engaged in trade or commerce simply by selling their property.

7. Corporations— real estate development companies—not alter egos of realtor owners

Real estate development companies were not the alter egos of two defendants who owned a real estate brokerage and who were partial owners of the development companies where the owners of the development companies were not acting as agents for the development company when dealing with plaintiffs. The action arose from plaintiffs' purchase through the brokerage of a coastal property with an ocean view across a tract that was about to be developed.

Appeal by plaintiffs from order entered 24 February 2009 by Judge Russell Lanier, Jr. and orders entered 8 September 2009, 9 September 2009, and 8 October 2009 by Judge John E. Nobles, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 1 September 2010.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, for plaintiffs-appellants.

Rose Rand Wallace Attorneys, P.A., by P. C. Barwick, Jr. and Kimberly Connor Benton, for defendants-appellees Wayne Driver, John Vann Parker, Jr., John Vann Parker, Roy K. Parker, Coastland Realty, Inc., and Century 21 Coastland Realty, Inc.

Richard L. Stanley for defendant-appellee Block 39, LLC.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R. Wheatly, III and Chadwick I. McCullen, for defendant-appellee BP2, Inc.

Michael Lincoln, P.A., by Michael Lincoln, for defendants-appellees Henry L. Reaves, Jr. and Susan A. Reaves.

GEER, Judge.

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

Plaintiffs Roger Sutton and Terri Sutton (the “Suttons”) appeal from orders granting summary judgment as to all defendants. In their complaint, the Suttons alleged fraud, negligent misrepresentation, and unfair and deceptive trade practices in connection with their purchase of a house owned by defendants Henry L. Reaves, Jr. and Susan A. Reaves (the “Reaveses”) that had an unobstructed view of the ocean. The Suttons contended that, in order to induce the Suttons to complete the sale, defendants withheld information material to their decision to purchase the property: that defendants Roy K. Parker and John Vann Parker (“Vann Parker”)—owners of the real estate agency that had entered into an agency agreement with the Suttons—were in negotiations (through defendants BP2, Inc. and later Block 39, LLC) to purchase and develop the vacant tract of land adjacent to the property purchased by the Suttons.

We hold that the Suttons have presented sufficient evidence to give rise to a genuine issue of material fact as to defendants Roy Parker, Vann Parker, Wayne Driver, Coastland Realty, Inc., and Century 21 Coastland Realty, Inc. (“the broker defendants”) based on the duties arising out of their agreement to act as the Suttons’ agents. While the evidence is sufficient to go to the jury as to the Parkers and as to Coastland Realty, Inc. and Century 21 Coastland Realty, Inc. (collectively “Coastland”) on all the Suttons’ claims, the Suttons have not pointed to any evidence that defendant Wayne Driver in fact knew of the Parkers’ intent and actions. With respect to Mr. Driver, we affirm as to the fraud claim, but reverse as to the negligent misrepresentation and unfair and deceptive trade practices claims. We reverse the grant of summary judgment for defendants Roy and Vann Parker, Coastland Realty, Inc., and Century 21 Coastland Realty, Inc. as to all claims.

The trial court also erred in granting summary judgment in favor of the Reaveses. The Reaveses may be held liable to the Suttons based on principles of agency since the broker defendants also acted as the Reaveses’ agents. The Suttons have not, however, offered a basis for holding the Reaveses liable for unfair and deceptive trade practices. Consequently, summary judgment is affirmed as to the Reaveses on the unfair and deceptive trade practices claim, but reversed as to fraud and negligent misrepresentation.

We agree with the trial court that summary judgment was proper as to Block 39, LLC and BP2 on all claims. The Suttons have made no showing of any duty owed to them by Block 39, LLC and BP2. The companies cannot be held liable for the acts of Roy Parker and Vann

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

Parker (the “Parkers”) based on *respondeat superior*—as the Suttons argue—because the Parkers’ acts giving rise to the claims of fraud, negligent misrepresentation, and unfair and deceptive trade practices were not performed while acting within the scope of their authority as employees or officers of Block 39, LLC and BP2 or in furtherance of the business of Block 39, LLC or BP2. We, therefore, affirm the trial court’s summary judgment order as to Block 39, LLC and BP2.

Facts

In April or May 2005, Roy and Vann Parker, who are brothers, approached David Barefield about acquiring and developing a piece of property on Emerald Isle identified as Block 39. The three men formed BP2 for this purpose. After these three individuals, along with two other potential investors identified by Mr. Barefield, decided that they were interested in buying Block 39, Roy Parker approached the owners of Block 39. He learned that Block 39’s owners were accepting bids on the property. On 30 June 2005, BP2 made a bid, signed by Vann Parker, to purchase Block 39 for \$21 million.

During the same time frame, the Suttons began to search for a beach house on Emerald Isle after their C.P.A. advised them to purchase one as an investment. The Suttons were referred to Roy Parker of Coastland. Roy and Vann Parker are the owners of Coastland. Wayne Driver, an agent with Coastland, was assigned to work with the Suttons. Roy Parker was Mr. Driver’s immediate supervisor and Vann Parker was Coastland’s broker-in-charge and Mr. Driver’s father-in-law.

The Suttons entered into a Buyer’s Agency Contract with Coastland on 26 May 2005. The agreement provided that the Suttons would conduct all negotiations for residential property through Coastland, as their “exclusive agent.” The agreement also set out Coastland’s duties. Paragraph seven of the agreement provided that “[d]uring the term of this Agreement, [Coastland] shall promote the interests of [the Suttons] by . . . (d) *disclosing to [the Suttons] all material facts related to the property or concerning the transaction of which [Coastland] has actual knowledge . . .*” (Emphasis added.)

When the Suttons became discouraged and indicated that they were considering ending their search, Mr. Driver let Roy Parker, his supervisor, know. Mr. Parker suggested that his neighbors, the Reaveses, might be willing to sell their beach house at 105 Wiley Court (“Wiley Court property”).

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

Mr. Driver first showed the house to Mrs. Sutton who was immediately interested in it because of its unobstructed view from the top deck of the ocean over the adjacent undeveloped tract of land. That piece of undeveloped land was Block 39. Subsequently, Mr. Driver showed the house to Mr. Sutton and, as they were on the deck looking at the view, Mr. Sutton asked Mr. Driver who owned the undeveloped tract. Mr. Sutton testified in his deposition that Mr. Driver told him that Block 39 was owned by a trust and “would probably never be sold” and that if it “were ever sold it would probably be years down the road.” Mr. Driver also told Mr. Sutton that the trust had been offered \$14 million for 17 or 18 acres and had turned down the offer.

Mr. Driver testified that he told Mr. Sutton that he did not know whether Block 39 would be developed. Although Mr. Driver had been keeping Roy Parker informed about the progress of the Suttons’ search, Mr. Driver testified that he did not tell Roy Parker about Mr. Sutton’s questions “because [he] felt like [he] had to answer truthfully to [Mr. Sutton] when [they] were on the deck.”

On 5 June 2005, the Suttons and Coastland signed a Dual Agency Agreement allowing Coastland to serve as the agent for both the Suttons and the owners of the Wiley Court property, the Reaveses. The Reaveses in turn signed the Dual Agency Agreement on 6 June 2005. The paragraph describing the broker’s dual agent role provided that both the seller and the buyer of the house understood and acknowledged:

- (a) Prior to the time Dual Agency occurs, [Coastland] will act as the exclusive Agent of Seller and/or Buyer;
- (b) In those separate roles Broker may obtain information which, if disclosed, could harm the bargaining position of the party providing such information to Broker;
- (c) *Broker is required by law to disclose to Buyer and Seller any known or reasonably ascertainable material facts.*

(Emphasis added.)

On 6 June 2005 the Suttons made an offer to purchase the Wiley Court property for \$735,000.00. Mr. Driver took the offer to Roy Parker who was the listing agent for the Reaveses. Although the Reaveses had listed the property for \$775,000.00, they accepted the Suttons’ offer. The parties entered into a contract for the purchase and sale of the property on 15 June 2005. The Suttons closed on the property on 10 or 11 August 2005.

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

With respect to Block 39, the tract's owners accepted BP2's bid and entered into a contract for the sale of Block 39 on 5 July 2005. Shortly thereafter, BP2 and two other investors formed a new company, Block 39, LLC. On 11 July 2005, Block 39, LLC filed a rezoning application with the Town of Emerald Isle seeking to rezone Block 39 as residential. Block 39, LLC closed on the Block 39 property on 13 October 2005. Block 39 was subdivided into 46 lots and became a residential subdivision called "Sea Oats." Coastland is responsible for marketing the property.

As a result of the development of Block 39, the value of the Suttons' house has decreased. In an affidavit, Dana Outlaw, a certified real estate appraiser, stated that as of 10 August 2005, the property had a value of \$720,000.00 because of its unobstructed view. At the time of the affidavit, two houses had been built on Block 39, partially obstructing the view and resulting in a market value of \$695,000.00. The Outlaw affidavit indicated that once Sea Oats is fully developed, the view from the Suttons' house would be completely obstructed. With a completely obstructed view, the house had a value of \$570,000.00.

The Suttons filed a complaint on 2 June 2008, asserting claims for fraud, negligent misrepresentation, unfair and deceptive trade practices, and "alter ego" (with respect to the claims against Coastland, Block 39, LLC, and BP2). The Suttons alleged in their complaint that defendants conspired to sell them the Wiley Court property, and in order to complete the sale, defendants failed to disclose key information that was either known, or should have been known, by defendants at the time of the sale.

Block 39, LLC filed a motion to dismiss and for judgment on the pleadings on 1 July 2008. Block 39, LLC argued that it did not legally exist until 13 July 2005, after the alleged fraud or misrepresentation, and therefore could not be liable to the Suttons. The trial court entered an order on 24 February 2009, holding that Block 39, LLC was "entitled to judgment on the pleadings or summary judgment as a matter of law."

The Reaveses filed an answer and a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6), dated 4 August 2008, and a motion for summary judgment dated 20 July 2009. In an order entered 8 October 2009, the trial court granted summary judgment in favor of the Reaveses.

The broker defendants (Mr. Driver, the Parkers, and Coastland) filed an answer and a motion to dismiss pursuant to Rule 12(b)(6),

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

dated 25 August 2008, and a motion for summary judgment dated 10 July “2090.” In an order entered 9 September 2009, the trial court granted summary judgment in favor of the broker defendants.

BP2 filed an answer, a motion to dismiss pursuant to Rule 12(b)(6), and a motion for summary judgment dated 6 August 2009. In an order entered 8 September 2009, the trial court granted summary judgment in favor of BP2. The Suttons appeal from each of these orders granting summary judgment.

Discussion

“It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.” *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (internal quotation marks omitted), *aff’d per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The moving party has the burden of establishing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party. *Id.* We review the trial court’s grant of summary judgment de novo. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

A. The Broker Defendants

[1] Fifty years ago, our Supreme Court held that “[t]here is involved in the relation of real estate broker and client a measure of trust analogous to that of an attorney at law to his client, or agent to his principal.” *State v. Warren*, 252 N.C. 690, 695, 114 S.E.2d 660, 665 (1960). More recently, this Court held that “[i]t is now well settled that a broker representing a purchaser or seller in the purchase or sale of property owes a fiduciary duty to his client based upon the agency relationship itself.” *Kim v. Prof’l Bus. Brokers Ltd.*, 74 N.C. App. 48, 51-52, 328 S.E.2d 296, 299 (1985). *See also Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 667, 347 S.E.2d 864, 865 (1986) (“A real estate broker stands in a relation of trust and confidence to his principal. In all matters

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

relating to his agency a broker owes his principals an obligation of utmost fidelity and good faith.” (internal citation omitted)).

It is well established that specific duties arise from this fiduciary relationship between a real estate broker and his or her client:

A real estate agent has the fiduciary duty “to exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so.” 12 C.J.S. *Brokers* § 53, at 160 (1980). “The care and skill required is that generally possessed and exercised by persons engaged in the same business.” *Id.*, § 53, at 161. This duty requires the agent to “make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence” and likely to affect the principal. *Id.*, § 57, at 172; James A. Webster, Jr., *Webster’s Real Estate Law in North Carolina* ‘8-9, at 243 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994) [hereinafter *Webster’s Real Estate Law in North Carolina*] (agent has duty to disclose all facts he “knows or should know would reasonably affect the judgment” of the principal). The principal has “the right to rely on his [agent’s] statements,” and is not required to make his own investigation. 12 C.J.S. *Brokers* § 57, at 172.

Brown v. Roth, 133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999). In sum, under *Brown*, a real estate broker has a duty to make full and truthful disclosure of all known or discoverable facts likely to affect the client. And, the client may rely upon the broker to comply with this duty and forego his or her own investigation. *See also Spence*, 82 N.C. App. at 667, 347 S.E.2d at 865-66 (“A broker has the duty not to conceal from his principals any material information and to make full, open disclosure of all such information.”).

Consequently, since the Suttons had entered into a Buyer’s Agency Contract with Coastland on 26 May 2005, Coastland had a duty to make a full and truthful disclosure to the Suttons of all material facts (1) known to Coastland, or (2) discoverable by Coastland with reasonable diligence. The contract in fact confirmed this duty by stating that Coastland would promote the interests of the Suttons by “disclosing to [the Suttons] all material facts related to the property . . . of which [Coastland] has actual knowledge . . .” In addition, *Brown* establishes that because of the fiduciary relationship, the Suttons

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

were not required to conduct any investigation, but rather were entitled to rely upon Coastland.¹

To the extent that the broker defendants have argued that the Dual Agency Agreement, entered into 5 June 2005, negated their fiduciary duty and duty of disclosure to the Suttons, *Brown* forecloses their argument. According to *Brown*, which specifically addressed dual agency, “[a] broker acting as a dual agent may still be liable in damages to one of the parties for a breach of duty to such party by reason of his acts in the course of the transaction. In other words, the dual agent owes all fiduciary and other agency duties to both principals.” 133 N.C. App. at 55, 514 S.E.2d at 296 (internal citation and quotation marks omitted). The Court continued: “Thus [the real estate agent] had a fiduciary obligation to make a full and truthful disclosure to [the client] of all material facts, with regard to the Property, known by it or discoverable with reasonable diligence.” *Id.*

The Suttons presented evidence that at the time Roy Parker steered the Suttons to the Wiley Court property and prior to the Suttons’ making an offer on that property, Roy Parker, who was supervising the Coastland agent working with the Suttons, and Vann Parker, Coastland’s broker-in-charge, knew that the owners of Block 39 were soliciting bids for the property. Further, the Parkers knew that they had plans to try to purchase Block 39 and develop it. The Suttons also offered evidence that, at that same time, Mr. Driver was telling Mr. Sutton that Block 39 was owned by a trust, “would probably never be sold,” and if it “were ever sold[,] it would probably be years down the road.”

In addition, only two weeks after the Suttons and the Reaveses entered into a contract for the Wiley Court property at a purchase price of \$735,000.00, the Parkers, through BP2, offered to purchase

1. None of the cases cited by the broker defendants regarding reasonable reliance involve the fiduciary broker-client relationship and, therefore, are irrelevant. See *John v. Robbins*, 764 F. Supp. 379, 390 (M.D.N.C. 1991) (“[Defendant brokers] may not evade their duty to communicate directly to their principals simply by demonstrating the material information was otherwise available to [their clients].”). To the extent that the broker defendants are suggesting that *Brown* should not mean what it says, that argument must be raised with the Supreme Court and not this Court. In addition, the broker defendants’ argument, couched in terms of reasonable reliance, which is still an element of fraud, addresses only Mr. Driver’s representations and ignores the Suttons’ claims based on non-disclosure. See *Forbis v. Neal*, 361 N.C. 519, 525, 649 S.E.2d 382, 386 (2007) (“When, as here, the fraud is allegedly committed by the superior party to a confidential or fiduciary relationship, the aggrieved party’s lack of reasonable diligence may be excused.”).

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

Block 39 for \$21 million, which exceeded the last offer rejected by Block 39's owners by \$7 million. Finally, *a month before the Suttons closed on the property*, the Parkers knew that Block 39's owners had accepted BP2's bid and that BP2 had successfully entered into a contract for the purchase of Block 39. Also prior to the Suttons' closing, the Parkers' new company, Block 39, LLC, sought to rezone the property to permit a residential subdivision. In sum, prior to the Suttons spending \$735,000.00 on the Wiley Court property, which had an unobstructed view of the ocean across Block 39, the Parkers knew, but did not disclose to the Suttons, that Block 39 would soon be developed and the view obscured.

The broker defendants' duty to disclose this information, if material, was not affected by the fact that the information arose out of the Parkers' business dealings separate from their real estate agency. Because of the fiduciary relationship, if the Parkers' development plans would materially affect their clients' decision to purchase the property and the price to be paid for the property, then a duty to disclose the information obtained in the course of those development plans still arose. *See Edwards v. West*, 128 N.C. App. 570, 572, 574, 495 S.E.2d 920, 922, 924 (upholding unfair and deceptive trade practices verdict against real estate agency, controlled by individual defendant, for failing to disclose to plaintiffs, who were purchasing subdivision lot from second company owned by individual defendant, that size of lot had changed), *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998).

For purposes of the summary judgment motion, the only significant issue, under *Brown* and *Spence*, is whether this information was material. While Mr. Driver was telling the Suttons, who were buying the property as an investment, that the Block 39 owners had rejected a significant offer, and the property might not be developed for years, Coastland's owners knew for a fact that the Block 39 owners were soliciting bids and, prior to closing, that a bid had been accepted, a sales contract had been entered into, and a residential subdivision would likely soon be built.

A non-disclosed fact is material when " 'the fact . . . wrongfully suppressed if it had been known to the party [would have] influenced his judgment or decision in entering the contract.' " *John*, 764 F. Supp. at 387 (quoting *Homelite v. Trywilk Realty Co.*, 272 F.2d 688, 691 (4th Cir. 1959)). We cannot conclude that information that the last undeveloped maritime tract on Emerald Isle, which adjoined the Wiley Court property, was likely being sold and developed into a sub-

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

division would not have influenced the Suttons' judgment or decision in buying the Wiley Court property.

While defendants stress that the Suttons were not seeking a house with an ocean view because they could not afford it, that fact is beside the point. The Suttons presented evidence that the future existence or non-existence of the view significantly affected the value of the Wiley Court property. Indeed, the Outlaw affidavit indicates that the Suttons paid \$150,000.00 too much for the Wiley Court property given that its view was going to be extinguished. A jury could reasonably find that the nondisclosed information, if known by the Suttons, would have, at a minimum, affected the amount that the Suttons were willing to spend to purchase the property. *See John*, 764 F. Supp. at 390 (holding that information was material to determining appropriate sales price for home); *Powell v. Wold*, 88 N.C. App. 61, 62, 68, 362 S.E.2d 796, 796-97, 800 (1987) (holding that buyers stated claims for fraud, negligent misrepresentation, and unfair and deceptive trade practices when buyers alleged that they asked whether any factor existed that could adversely affect value of property in future and realtor did not disclose that major road extension was planned in vicinity of property).

In addition, the broker defendants have argued that the Suttons were aware that a \$14 million offer had been made on the property, although rejected, and that a "For Sale" sign was posted on the property. They argue that the Suttons were, as a result, aware that Block 39 was for sale and could be purchased and developed at any time. The Suttons, however, presented evidence that Mr. Driver had told them that Block 39 "was owned by a land trust and would probably never be sold" and that "if [Block 39] were ever sold it would probably be years down the road" In addition, Mr. Driver pointed out to them that the owners had recently rejected a \$14 million offer. Although Mr. Driver's recollection differed from that of Mr. Sutton's, Mr. Driver still testified that he told Mr. Sutton that he did not know whether the property would be developed. As for the "For Sale" sign, Mr. Driver acknowledged that the sign had been on the property for 10 years or more. When this evidence is viewed in the light most favorable to the Suttons, it would permit a jury to find that the Suttons did not know that the property was likely to be sold and developed in the near future.

[2] Turning to the Suttons' specific claims for relief, as our Supreme Court has observed, "[w]hile actual fraud has no all-embracing definition, the following essential elements of actual fraud are well estab-

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

lished: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” *Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 387 (internal quotation marks omitted). “Additionally, any reliance on the allegedly false representations must be reasonable. The reasonableness of a party’s reliance is a question for the jury, unless the facts are so clear that they support only one conclusion.” *Id.* at 527, 649 S.E.2d at 387 (internal citation omitted).

In contending that summary judgment was proper on the fraud claim, the broker defendants have focused on whether there was a false misrepresentation of a material fact. The Suttons have, however, presented evidence that the broker defendants failed to disclose material facts that they had a duty to disclose. *Brown* establishes that their reliance on the broker defendants was reasonable.

Although the broker defendants make no argument regarding the intent element, we believe that the Suttons have forecast sufficient evidence of intent as to Coastland and the Parkers based on the evidence that Roy Parker caused the Suttons to be steered to the Wiley Court property at precisely the same time he and Vann Parker, Coastland’s broker-in-charge, were working to purchase the neighboring Block 39 property; that the Reaveses (whose listing agent was Roy Parker for Coastland) accepted an offer \$40,000.00 less than their asking price without making any counteroffer; and that no disclosure regarding the Parkers’ company entering into a contract for the purchase of Block 39 was made to the Suttons between the time they entered into the contract and closed on the Wiley Court property. We hold that this evidence would permit a finding that the non-disclosure was reasonably calculated to deceive and did deceive the Suttons into purchasing the property, especially at a higher price.

The broker defendants have not disputed that Coastland may be held liable based on the acts of Roy and Vann Parker. Nor have they made any specific argument regarding Roy and Vann Parker’s liability as brokers. Since there is no dispute that the Suttons were actually deceived and were damaged, we reverse the trial court’s entry of summary judgment for Coastland, Roy Parker, and Vann Parker on the fraud claim. Necessarily, because the evidence could permit a jury to find that the Parkers (and Coastland) acted negligently rather than intentionally, we also reverse the summary judgment order as to these defendants on the negligent misrepresentation claim.

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

[3] The broker defendants do, however, make further arguments regarding Mr. Driver's liability. The Suttons have pointed to no evidence that Mr. Driver was aware of Roy and Vann Parker's actions regarding Block 39 or the imminency of any sale of Block 39. At most, the Suttons argue that Mr. Driver avoided acquiring knowledge. They do not, however, explain in what way Mr. Driver's actions constituted fraud as opposed to negligence. We, therefore, hold that the trial court properly granted summary judgment to Mr. Driver on the fraud claim. *See Brown*, 133 N.C. App. at 56, 514 S.E.2d at 297 ("Because there is no evidence in this record that Defendant knew it had communicated false square footage information to Plaintiff, summary judgment on the fraud and unfair and deceptive trade practices claims was proper.").

[4] With respect, however, to the negligent misrepresentation claim, even though Roy Parker was Mr. Driver's supervisor and even though Mr. Driver had been keeping Mr. Parker informed of his progress with the Suttons, Mr. Driver did not talk to Mr. Parker about Mr. Sutton's questions regarding the possible development of Block 39 because, as Mr. Driver admitted in his deposition: "I felt like I had to answer truthfully to them when we were on the deck." The broker defendants argue as to this testimony: "The Suttons have interpreted this statement to mean that Driver did not want to learn facts which contradicted his original opinion. Driver did not speak to Roy Parker about this issue because he had given his personal opinion while on the third floor deck and he thought he had answered Roger Sutton's question truthfully."

Mr. Driver's testimony is, as the broker defendants implicitly acknowledge, a matter of interpretation for the jury. It is up to a jury to decide why Mr. Driver did not speak to Roy Parker and whether, when he did not do so, he failed to act with reasonable diligence to uncover material information.

[5] As for the Suttons' unfair and deceptive trade practices claim, it is well established that "[p]roof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 484, 593 S.E.2d 595, 601 (quoting *Webb v. Triad Appraisal & Adjustment Serv., Inc.*, 84 N.C. App. 446, 449, 352 S.E.2d 859, 862 (1987)), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 48, 49 (2004). In addition, this Court has held that "[a] claim of unfair and deceptive trade practice can be established against realtors by proving either fraud or negligent misrepresentation in the commercial setting."

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

Edwards, 128 N.C. App. at 575, 495 S.E.2d at 924 (emphasis added).² We, therefore, reverse summary judgment as to all of the broker defendants on the claim of unfair and deceptive trade practices.

B. Mr. and Mrs. Reaves

[6] Reversal of summary judgment as to the broker defendants requires reversal as to the Reaveses as well with respect to the claims of fraud and negligent misrepresentation. As the United States District Court for the Middle District of North Carolina has explained in the real estate context: “North Carolina decisions have generally ruled the principal is liable for the fraudulent acts of his real estate agent.” *John*, 764 F. Supp. at 394 (citing *Norburn v. Mackie*, 262 N.C. 16, 23, 136 S.E.2d 279, 284-85 (1964)).

In *Norburn*, the Supreme Court concluded that the property owner could be liable for an agent’s misrepresentation to a potential purchaser of the property based on “[t]he general rule . . . that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent’s actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts.” 262 N.C. at 23, 136 S.E.2d at 284-85. See also *Vickery v. Olin Hill Constr. Co.*, 47 N.C. App. 98, 101-02, 266 S.E.2d 711, 714 (“If the jury should find that plaintiffs were injured by the fraudulent representations of [the real estate agent], then both [the real estate agency and the property owner], as principals, must be held answerable for the fraudulent act of their agent.”), *disc. review denied*, 301 N.C. 106 (1980).

The Suttons are not, however, entitled to proceed on their unfair and deceptive trade practices claim against the Reaveses as the homeowners. See *Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979) (“The defendants [homeowners] were not engaged in trade or commerce. They did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise.”). We, therefore, affirm the entry of summary judgment for the Reaveses on the unfair and deceptive trade practices claim.

2. In *Brown*, the Court upheld summary judgment on both the fraud and the unfair and deceptive trade practices claims even though a negligent misrepresentation claim survived because the plaintiff had only argued fraud as a basis for the unfair and deceptive trade practices claim. 133 N.C. App. at 56 n.3, 514 S.E.2d at 297 n.3.

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

C. Block 39, LLC and BP2, Inc.

[7] In their complaint, the Suttons claimed BP2 and Block 39, LLC were the alter egos of the Parkers because they were undercapitalized and corporate formalities were not followed. On appeal, however, the Suttons have pointed to no evidence that supports this claim. Instead, the Suttons argue that BP2 and Block 39, LLC are liable for the acts of the Parkers based on *respondeat superior*.

This theory fails, however, because the Suttons have not shown that the Parkers were acting as agents of BP2 or Block 39, LLC when dealing with the Suttons. “A principal is liable for torts of his agent when the agent commits a negligent act within the scope of the agent’s employment and in furtherance of the principal’s business.” *Felts v. Hoskins*, 115 N.C. App. 715, 717, 446 S.E.2d 110, 111-12 (1994) (holding employer not liable for negligence of vice president resulting in accident because employee was not acting as agent at time of accident). More specifically,

“[u]nder the doctrine of respondeat superior, a principal is liable for the torts of its agent which are committed within the scope of the agent’s authority, when the principal retains the right to control and direct the manner in which the agent works. Of course, respondeat superior does not apply unless an agency relationship of this nature exists.”

Holleman v. Aiken, 193 N.C. App. 484, 504, 668 S.E.2d 579, 592 (2008) (quoting *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 216, 552 S.E.2d 686, 695 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002)).

Here, the Parkers were acting in their capacity as agents of Coastland when the purported fraud and negligence occurred. The Suttons have pointed to no evidence (1) that the Parkers were acting within the scope of any authority granted to them by BP2 or Block 39, LLC, (2) that the Parkers were acting in furtherance of the business of BP2 or Block 39, LLC, or (3) that BP2 or Block 39, LLC possessed the right to control or direct the actions of the Parkers in connection with their interactions with the Suttons. Without such evidence, the Suttons have failed to establish any basis for imposing liability on either BP2 or Block 39, LLC based on *respondeat superior*.

The Suttons rely on *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 654, 273 S.E.2d 268, 272 (1981), and its holding “that when the interests of the individual officer or director are so clearly aligned with those of the

SUTTON v. DRIVER

[211 N.C. App. 92 (2011)]

corporation, the corporation is properly charged with the knowledge of the individual.” In *Hice*, the plaintiff sold approximately 900 acres of property to the defendant corporation. *Id.* at 652, 273 S.E.2d at 271. The deed mistakenly also conveyed a noncontiguous tract of approximately 13 acres. *Id.* The plaintiff’s attorney later notified the sole owner of the defendant corporation of the mistake in an attempt to correct the deed. *Id.* The Supreme Court held that the corporation was charged with this knowledge and, therefore, was not a bona fide purchaser. *Id.* at 654, 273 S.E.2d at 272.

The issue in *Hice* was thus only whether the principal could be charged with the knowledge of its agent. It did not address the issue here: whether the principal could be held liable for torts committed by one of its agents when acting outside the scope of his employment and not in furtherance of the principal’s business or under the principal’s direction and control. *Hice* did not purport to change the law of agency and, therefore, is not controlling in this case.

Conclusion

In sum, we affirm the trial court’s entry of summary judgment as to defendants BP2 and Block 39, LLC as to all claims. We reverse the grant of summary judgment for defendants Coastland, Roy Parker, and Vann Parker as to all claims. We affirm the entry of summary judgment as to Wayne Driver on the fraud claim, but reverse it as to the negligent misrepresentation and unfair and deceptive trade practices claims. With respect to the Reaveses, we affirm summary judgment as to the unfair and deceptive trade practices claim, but reverse it as to fraud and negligent misrepresentation.

Affirmed in part; reversed in part.

Judges McGEE and CALABRIA concur.

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

STATE OF NORTH CAROLINA v. JOHN ROSCOE NOLAN

No. COA10-518

(Filed 19 April 2011)

1. Appeal and Error— preservation of issues—denial of second motion to dismiss

The denial of a motion to dismiss evidence of illegal drugs seized from defendant and his car at a checkpoint was not properly before the Court of Appeals where a prior motion on the constitutionality of the checkpoint was denied and the second motion, on the seizure itself, was not ruled upon. Defendant did not challenge the trial court's failure to rule on the second motion or provide a reason for granting it not related to the first.

2. Criminal Law— traffic checkpoint—primary programmatic purpose—constitutional

The trial court properly determined that the primary programmatic purpose of a traffic checkpoint was constitutionally permissible when the evidence was considered in its entirety, including the written plan as well as the officers' conflicting testimony.

3. Criminal Law— traffic checkpoint—constitutionally reasonable

The trial court correctly determined that a traffic checkpoint was reasonable where the court applied the three-prong test of *Brown v. Texas*, 443 U.S. 47, and considered the gravity of the public concerns, the degree to which the public interest was advanced and to which the checkpoint was tailored to fit its primary purpose, and the severity of the interference with individual liberty.

Appeal by defendant from judgment entered 24 September 2009 by Judge James E. Hardin, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 27 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General John R. Green, Jr., for the State.

Benjamin D. Porter, for defendant-appellant.

CALABRIA, Judge.

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

John Roscoe Nolan¹ (“defendant”) appeals the trial court’s judgment for the offenses of possession with intent to sell or deliver marijuana, possession of drug paraphernalia, carrying a concealed weapon, and maintaining a vehicle or dwelling used for keeping and selling controlled substances. More specifically, defendant appeals the trial court’s denial of his motion to suppress evidence. We affirm.

I. BACKGROUND

At approximately 11:00 p.m. on 6 July 2007, law enforcement officers from the Kernersville Police Department (“KPD”), King Police Department, Winston-Salem Police Department, Forsyth County Sheriff’s Department (“FCSD”), and the North Carolina Highway Patrol participated in a checking station (“the checkpoint”) at the intersection of the 800 block of South Main Street and the 800 block of Old Winston Road, “a main thoroughfare” in Kernersville, North Carolina. The purpose of the checkpoint was “[t]o determine compliance with the Motor Vehicle Code.” The ultimate goal of this combined effort was to reduce crashes, injuries, and deaths from impaired driving offenses.

Officer L.D. Griffith (“Officer Griffith”) of the Traffic Enforcement Division of the KPD scheduled the checkpoint that was established pursuant to a written “Checking Station Plan” (“the plan”). Officer Griffith obtained a form memorandum from the Governor’s Highway Safety Program (“the standard plan”) which he adapted to serve as a checklist, and then submitted the memorandum regarding the plan to all participating law enforcement officers. The plan included the starting and ending times of the checkpoint. It was scheduled to start at 11:00 p.m. on 6 July 2007 and end at 3:00 a.m. on 7 July 2007. In addition to the times of operation, the plan described the procedures and equipment to be used. The plan also included briefing all participants regarding the procedures, equipment, location, and times of operation of the checkpoint. More importantly, the plan required the officers to stop every vehicle coming through the checkpoint. Once stopped, the officers were directed to ask every driver to produce his or her license and vehicle registration, then to tell the officer their destination.

On 7 July 2007 at midnight, Officer Griffith was present and supervised the checkpoint, and approximately thirty officers in

1. Documents in the record on appeal also identify defendant as “John Roscoe Nolen.” However, since the trial court’s judgment identifies defendant’s last name as “Nolan,” we refer to him in this opinion by that spelling.

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

twenty to twenty-five marked patrol cars were assigned to the checkpoint. At that time, defendant drove a Pontiac Bonneville (“the vehicle”) and was stopped at the checkpoint. Deputy J. Moore (“Deputy Moore”) of the FCSD, one of the officers assigned to the checkpoint, approached defendant’s vehicle and asked defendant for his license. As Deputy Moore spoke with defendant, he detected an odor of alcohol. Deputy Moore asked defendant “about the odor, and he said he had not been drinking.” Deputy Moore then asked defendant “about . . . a six-pack of Budweiser Select” which Deputy Moore observed “in the back seat with two bottles missing.” When Deputy Moore asked defendant about the missing bottles, defendant admitted he “had a couple earlier.” Deputy Moore then asked defendant to exit the vehicle, and as defendant exited, Deputy Moore observed a “clip knife” on defendant’s pocket. Deputy Moore then advised defendant that he was going to conduct a field sobriety test and asked defendant to “pull the stuff out of his pockets.”

Defendant prepared for the field sobriety test by removing the objects from his pants pockets. As defendant removed a sunglasses case from his pants pocket, a second officer, Deputy J. Bracken (“Deputy Bracken”) of the FCSD, who was assigned to the checkpoint, observed a plastic bag containing a substance which appeared to be marijuana. Deputy Bracken asked defendant, “What’s the plastic baggie?” and defendant replied, “Uh, oh.” Deputy Bracken searched defendant and the search revealed another plastic bag, a glass pipe, and a lighter. A K-9 officer approached with a K-9 dog, to detect the presence of drugs in the vehicle. When officers searched defendant’s vehicle, they discovered multiple items of contraband, including drugs.

Defendant was arrested,² indicted, and later pled guilty to two counts of possession with intent to sell or deliver marijuana, possession of drug paraphernalia, carrying a concealed weapon, and maintaining a vehicle or dwelling used for keeping and selling controlled substances.³

Prior to defendant’s guilty plea, defendant filed a motion to suppress evidence (“the first motion”) in Forsyth County Superior Court. Defendant challenged the checkpoint, arguing that it “was not set up,

2. Defendant was not charged with DWI because he passed the field sobriety test.

3. The trial court dismissed the charges of possession of a Schedule II controlled substance and possession of a Schedule III controlled substance pursuant to his plea agreement with the State.

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

conducted or maintained pursuant to a valid programmatic purpose and its operation and management did not meet the constitutional requirements set out under the Fourth and Fourteenth Amendments to the United States Constitution” Furthermore, defendant asked the trial court: (1) to suppress all evidence obtained as a result of the stop and seizure and (2) to suppress any and all fruits of “said illegal stop.”

A hearing on the first motion was held before the Honorable James E. Hardin, Jr. (“Judge Hardin”). Defendant did not present any evidence. Following the hearing, the trial court denied the first motion. In the order, the trial court found that defendant had not “alternatively and independently argued that the search of the [d]efendant and resulting seizure of contraband was illegal.”

On 20 October 2009, defendant filed a second motion to suppress evidence (“the second motion”) that was heard before the Honorable L. Todd Burke (“Judge Burke”). However, Judge Burke did not rule on the second motion. When defendant entered his guilty plea on 1 December 2009 before Judge Burke, defendant specifically reserved the right to appeal all constitutional issues raised including the constitutionality of the checkpoint and defendant’s stop and seizure by all officers including Deputy Bracken.

On 7 December 2009, Judge Burke sentenced defendant to serve a minimum term of five months to a maximum term of six months in the custody of the North Carolina Department of Correction, suspended the sentence, and placed defendant on supervised probation for twelve months. Defendant appeals.

II. STANDARD OF REVIEW

When reviewing a motion to suppress evidence, this Court determines whether the trial court’s findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. If supported by competent evidence, the trial court’s findings of fact are conclusive on appeal, even if conflicting evidence was also introduced. However, conclusions of law regarding admissibility are reviewed *de novo*.

State v. Wilkerson, 363 N.C. 382, 433-34, 683 S.E.2d 174, 205 (2009) (internal citations omitted). “The question for review is whether the ruling of the trial court was correct and . . . whether the ultimate ruling was supported by the evidence.” *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (internal citation omitted). If the trial court’s findings of fact support its conclusions of law, “the trial

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57 (1995) (citation omitted).

III. INITIAL MATTERS

[1] The State, as an initial matter, urges this Court not to consider the second motion on the ground that defendant failed to obtain a ruling on the motion as required by N.C. R. App. P. 10(b)(1). We agree with the State that the second motion is not properly before us, but reach this conclusion for different reasons.

Defendant's first motion was heard by Judge Hardin. Defendant asserted that the checkpoint "was not set up, conducted or maintained pursuant to a valid programmatic purpose and its operation and management did not meet the constitutional requirements set out under the Fourth and Fourteenth Amendments to the United States Constitution" Defendant argued that the checkpoint was unconstitutional because its programmatic purpose was not to detect impaired drivers, as the State contended, but instead was "an unlawful multipurpose checkpoint geared towards general crime prevention and drug interdiction."

Judge Hardin denied the first motion and concluded that the checkpoint had a valid and appropriately tailored programmatic purpose: the detection of drivers operating a motor vehicle while impaired. In addition, Judge Hardin noted in his findings of fact:

The Defendant confines his contentions and arguments to the alleged unconstitutionality of the stop of the Defendant and of the fruits of a resulting search that yielded seized contraband. In the event of a finding that the Driving While Impaired "Checking Station" was constitutional in its purpose and application, the Defendant has not alternatively and independently argued that the search of the Defendant and resulting seizure of the contraband was illegal.

Judge Hardin then explained that although "this court has made findings of fact sufficient to make these conclusions of law, this has not been done because of the parameters of the Defendant's contentions and arguments raised, and of the authorities cited." Judge Hardin, therefore, made no conclusions of law on any issue other than the constitutionality of the checkpoint. Judge Hardin concluded the checkpoint was constitutional and denied the first motion.

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

Defendant then filed the second motion, asserting that “the individual search and resulting seizure of the alleged contraband was illegal pursuant to the Fourth and Fourteenth Amendments to the United States Constitution” The second motion was heard by Judge Burke. Defendant’s counsel argued to Judge Burke that Judge Hardin had left open the question whether, even though the checkpoint as implemented by the first officer (Deputy Moore) was constitutional, the individual search (conducted by Deputy Bracken) that followed the initial stop was unconstitutional. Based on that argument, Judge Burke concluded that because Judge Hardin “hasn’t made a ruling on it, I’m going to have to hear it because [defendant’s] asking that a ruling be made on it now.”

After the parties addressed whether Judge Burke should hear testimony or whether Judge Hardin’s factual findings were binding, it became clear that defendant’s counsel was still focusing on the checkpoint. Defendant’s counsel contended that Judge Hardin concluded that the programmatic purpose of the checkpoint was “fine,” but then “invited . . . a secondary motion that the application of the checkpoint and the search that was done outside the realm of the checkpoint by Deputy Bracken was invalid.” When Judge Burke pointed out that Judge Hardin had concluded that “there was nothing wrong with the checkpoint,” defendant’s counsel responded that the law requires both that the checkpoint have a proper programmatic purpose and that it be narrowly tailored. According to defendant’s counsel, Judge Hardin had addressed only the programmatic purpose prong, but had left open the issue whether the checkpoint was narrowly tailored.

After defendant’s counsel made it plain that in the second motion, defendant was still challenging an aspect of the checkpoint’s constitutionality, Judge Burke pointed out that the constitutionality of the checkpoint had already been decided by Judge Hardin. He, therefore, concluded that he had no authority to hear the second motion since it would essentially require him to conclude that Judge Hardin had erred in ruling that the checkpoint was constitutional. Defendant then chose to plead guilty.

On appeal, while defendant quotes, in part, Judge Burke’s explanation regarding why he did not believe that he had authority to decide the second motion, defendant never argues that Judge Burke erred in refusing to decide the second motion. Defendant challenges only Judge Hardin’s ruling by asserting in appellant’s brief, “Judge

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

Hardin's view that the checkpoint itself and the search of the defendant are distinct and separate transactions, is a hypertechnical view of the checkpoint." Defendant then confirmed that he still primarily challenged the constitutionality of the checkpoint:

In the instant case, it is clear that the checkpoint was used to detect impaired drivers, but the actions of Deputies Moore and Bracken support a finding that the checkpoint had an impermissible purpose of general law enforcement or drug interdiction, as is further supported by the fact that the DWI checkpoint yielded four DWI arrests and one hundred (100) other violations.

With respect to any other Fourth Amendment violation apart from the checkpoint itself, defendant stated only, quoting Judge Hardin's finding of fact:

In any event, appellant specifically alleged that the 'search and resulting seizure of contraband' was illegal in his second Motion to Suppress before Judge Burke. *For these reasons*, Appellant's Motion to Suppress was not defective for failing to 'alternatively and independently [argue] that the search of the defendant and resulting seizure of contraband was illegal.' "

(internal citation omitted and emphasis added). In the conclusion of his brief, defendant stated: "Because the appellant was illegally searched during the course of a DWI checkpoint, the checkpoint itself had an impermissible purpose and was unreasonable. Alternatively, because the appellant was illegally searched, the resulting seizure of contraband should have been suppressed. Therefore, appellant's Motion to Suppress should have been allowed."

Defendant's brief cannot be read as suggesting that Judge Burke erred in any respect or that anything further needed to be done as to the second motion. Instead, defendant seems to be arguing that Judge Hardin erred in finding that the first motion was inadequate. In making this argument, defendant curiously contends that the first motion was not inadequate because of language in the second motion that was never before Judge Hardin. The conclusion of his brief then refers to only one motion to suppress.

In addition, nowhere in defendant's brief does he present any argument or provide any explanation as to how he was "illegally searched" apart from the checkpoint and its alleged impermissible purpose. As Appellate Rule 28(b)(6) provides, "[i]ssues . . . in support

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6) (2010). We cannot, after careful review of defendant’s brief, see any place that defendant challenges the failure to rule on his second motion or provides a basis unrelated to the checkpoint on which the second motion should have been granted. Therefore, the second motion is not properly before us and all further references to “the trial court” will pertain to the proceedings before Judge Hardin.

IV. CONSTITUTIONALITY OF THE CHECKPOINT

[2] Defendant argues that the trial court erred in denying the first motion. Defendant claims the “checkpoint was not set up, conducted or maintained pursuant to a valid programmatic purpose and its operation and management did not meet the constitutional requirements set out under the Fourth and Fourteenth Amendments to the United States Constitution” We disagree.

“‘[P]olice officers effectuate a seizure when they stop a vehicle at a checkpoint.’ As with all seizures, checkpoints conform with the Fourth Amendment only ‘if they are reasonable.’” *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339 (2005) (quoting *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004)). “Thus, ‘police may briefly detain vehicles at a roadblock checkpoint with out individualized suspicion, so long as the purpose of the checkpoint is legitimate and the checkpoint itself is reasonable.’” *State v. Jarrett*, — N.C. App. —, —, — S.E.2d —, — (2010) (quoting *State v. Veazey*, 191 N.C. App. 181, 184, 662 S.E.2d 683, 686 (2008) (citations omitted)).

When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . . Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

Veazey, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87 (internal quotations and citations omitted).

A. Primary Programmatic Purpose

“In considering the constitutionality of a checkpoint, the trial court must initially ‘examine the available evidence to determine the

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

purpose of the checkpoint program.’ ” *State v. Gabriel*, 192 N.C. App. 517, 521, 665 S.E.2d 581, 585 (2008) (quoting *Rose*, 170 N.C. App. at 289, 612 S.E.2d at 339).

Our Court has previously held that where there is no evidence in the record to contradict the State’s proffered purpose for a checkpoint, a trial court may rely on the testifying police officer’s assertion of a legitimate primary purpose. However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer’s bare statements as to a checkpoint’s purpose. In such cases, the trial court may not simply accept the State’s invocation of a proper purpose, but instead must carr[y] out a close review of the scheme at issue. This type of searching inquiry is necessary to ensure that an illegal multi-purpose checkpoint [is not] made legal by the simple device of assigning the primary purpose to one objective instead of the other[.]

Veazey, 191 N.C. App. at 187, 662 S.E.2d at 687-88 (internal quotations and citations omitted). “[W]hen a trooper’s testimony varies concerning the primary purpose of the checkpoint, the trial court is ‘required to make findings regarding the actual primary purpose of the checkpoint and . . . to reach a conclusion regarding whether this purpose was lawful.’ ” *Gabriel*, 192 N.C. App. at 521, 665 S.E.2d at 585 (quoting *Veazey*, 191 N.C. App. at 190, 662 S.E.2d at 689).

In the instant case, Officer Griffith testified that the purpose of the checkpoint was “to stop subjects from driving while impaired.” He also testified that officers were to check drivers’ licenses to make sure they were current, and that if drivers were “in violation of their registration being out or their license [was] expired or suspended, [they would be charged] as well.” However, on cross-examination, Officer Griffith stated that officers at the checkpoint would be looking for weapons and “other criminal” violations, such as drug violations and stolen vehicles. Additionally, Officer Griffith stated that during the checkpoint, one officer would approach a stopped vehicle while a second officer would approach and “look for other violations of the law,” including observing whether there were drugs “in plain sight.”

Additional testimony was presented by Deputy Bracken, who assisted Deputy Moore. Deputy Bracken explained that his purpose was “to check and make sure there was [sic] no weapons or no obvious threats in the car,” and that a FCSO narcotics K-9 officer was present at the checkpoint. “Because variations existed in [the officers’] testi-

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

mony regarding the primary purpose of the checkpoint, the trial court was required to make findings regarding the actual primary purpose of the checkpoint.” *Jarrett*, — N.C. App. at —, — S.E.2d at —.

During Officer Griffith’s testimony on direct examination, the State introduced, without objection, the written “Checking Station Plan” (“Exhibit 1”). Officer Griffith testified that he was the officer who created Exhibit 1, and that he was the officer in charge at the checkpoint. He further testified that Exhibit 1 had not been changed or altered in any way since 6 July 2007. According to Officer Griffith’s testimony, Exhibit 1 included: (1) the location of checkpoint at the 800 block of South Main Street and the 800 block of Old Winston Road in Kernersville; (2) the times of operation of the checkpoint from 11:00 p.m. on 6 July 2007 until 3:00 a.m. on 7 July 2007; (3) the procedures to be followed, such as stopping every vehicle entering the checkpoint; and (4) the equipment to be used, such as posting signs in advance of the checkpoint to notify approaching drivers of the checkpoint, and activating blue lights. The plan was distributed to all participating law enforcement agencies, and Officer Griffith, as the supervising officer, was the only officer authorized to approve changes to the plan.

Furthermore, Officer Griffith testified that Exhibit 1 directed the officers to determine whether the addresses on the driver’s license and registration matched the information available, and whether the presented license was valid or revoked when a vehicle was stopped at the checkpoint. Officers would also check for an odor of alcohol or marijuana, and observe other physical characteristics such as slurred speech or glassy eyes. If all information was current and valid and the officers were not concerned about any driver’s noncompliance with the Motor Vehicle Code, officers would return the driver’s license and registration and the driver was free to leave. Officer Griffith testified that in situations where the officers were satisfied, the entire encounter would take approximately fifteen to twenty seconds.

Although the officers offered conflicting testimony on the purpose of the checkpoint, Officer Griffith’s testimony must be viewed along with Exhibit 1. When the officers’ testimony is supplemented by a written plan, then the evidence must be viewed in its entirety. When viewed in the entirety, the evidence supports the trial court’s finding that the officers complied with the written checkpoint plan conducted pursuant to a memorandum titled “Checking Station Plan” and prepared by Officer Griffith from the “standard plan” adapted

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

from the Governor's Highway Safety Program. The trial court also found that: (1) Officer Griffith, a supervising officer, was present; (2) all cars coming through the checkpoint were stopped; (3) only Officer Griffith had the ability or authority to alter the plan or its execution; (4) the plan was not altered in any way except for an "inconsequential adjustment" of the exit from I-40 as directed by Officer Griffith; (5) signs were set out in advance of the checkpoint alerting drivers of the checkpoint; (6) stationary and temporary lighting illuminated the checking station; (7) the blue lights were activated on all law enforcement vehicles; (8) the drivers of all vehicles stopped at the checkpoint were asked for their license, registration, and destination; and (9) when the officers checked the drivers' licenses presented, the drivers were asked whether the addresses matched information available, and whether the presented license was valid or in revocation. At the time the officers followed the procedures in the plan, they also checked drivers for an odor of alcohol. Furthermore, the trial court found that the stated purpose of the plan was to "determine compliance with the Motor Vehicle Code" and that the ultimate goal of the checkpoint was to "reduce crashes; injuries and deaths all contributed (sic) to impaired driving offenses."

As a result of these findings, the trial court concluded that the primary programmatic purpose of the checkpoint was "the detection of drivers operating a motor vehicle while impaired and that the 'procedure was not merely to further general crime control.'" (internal citation omitted). Our Courts have upheld checkpoints where it found that a checkpoint's lawful primary purpose was designed to "uncover drivers' license and vehicle registration violations," *Veazey*, 191 N.C. App. at 189, 662 S.E.2d at 689, and detect intoxicated drivers, *Veazey*, 191 N.C. App. at 185, 662 S.E.2d at 686. Therefore, the trial court properly determined the primary programmatic purpose of the checkpoint was constitutionally permissible.

B. Reasonableness

[3] "Although the trial court concluded that the checkpoint had a lawful primary purpose, 'its inquiry does not end with that finding.'" *Jarrett*, — N.C. App. at —, — S.E.2d at — (quoting *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342). "Instead, the trial court must still determine 'whether the checkpoint itself was reasonable.'" *Id.* at —, — S.E.2d at (quoting *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 689-90).

"To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's pri-

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

vacy interest.” *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342. “In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979).” *Jarrett*, — N.C. App. at —, — S.E.2d at — (citing *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342). “Under *Brown*, the trial court must consider ‘[1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty.’” *Id.* at —, S.E.2d at — (quoting *Rose*, 170 N.C. App. at 293-94, 612 S.E.2d at 342 (internal quotations and citation omitted)).

1. The gravity of the public concerns

“The first *Brown* factor—the gravity of the public concerns served by the seizure—analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public.” *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342.

Both the United States Supreme Court as well as our Courts have suggested that license and registration checkpoints advance an important purpose. The United States Supreme Court has also noted that states have a vital interest in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690 (internal quotations and citations omitted). In *Veazey*, we held that a checkpoint that was operated for the purpose of checking drivers’ licenses would not violate the Fourth and Fourteenth Amendments. *Id.* at 185, 662 S.E.2d at 686. In addition, we note that “[i]nvestigating officers may take such steps as are reasonably necessary to maintain the status quo and to protect their safety during an investigative stop.” *United States v. Taylor*, 857 F.2d 210, 213 (4th Cir. 1988). As previously noted, the trial court determined that the primary programmatic purpose of the checkpoint was constitutionally permissible.

When the officers stopped defendant and asked him for his license, the officers performed the primary purpose of the checkpoint. As Deputy Moore spoke with defendant, he detected an odor of alcohol and observed two beer bottles missing from a six-pack in defendant’s back seat. Defendant then admitted to Deputy Moore that

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

he consumed alcohol earlier that evening. Deputy Moore then asked defendant to exit the vehicle to perform a field sobriety test. Deputy Moore's actions were consistent with the trial court's conclusion that the checkpoint was also designed to detect "drivers operating a motor vehicle while impaired."

When Deputy Moore noticed defendant was carrying a small knife, he asked defendant about a bulge in defendant's pants pocket. Defendant then emptied his pockets, and Deputy Bracken observed in plain view a clear bag containing a substance which he believed to be marijuana. Although defendant was not charged with driving while impaired, he possessed a weapon, drugs, and drug paraphernalia. The actions taken by Deputies Moore and Bracken were reasonably necessary to maintain their safety during the operation of the checkpoint. The trial court properly concluded "that upon a consideration of the individual circumstances as applied to the subject case and of the applicable factors regarding the reasonableness of the [checkpoint] . . . the gravity of the public concerns [are directly] served by the seizure." Therefore, "the checkpoint adequately satisfied the requirements of the first prong of *Brown*." *Jarrett*, — N.C. App. at —, — S.E.2d at —.

2. The degree to which the seizure advanced public interests

"Under the second *Brown* prong—the degree to which the seizure advanced public interests—the trial court was required to determine 'whether [t]he police appropriately tailored their checkpoint stops to fit their primary purpose.'" *Id.* at —, — S.E.2d at — (quoting *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690) (internal quotations and citation omitted).

Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690.

In the instant case, the trial court's order found as fact, supported by Officer Griffith's testimony and Exhibit 1, that: (1) the checkpoint was established pursuant to a memorandum published on 6 July 2007,

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

which was prepared from the “standard plan” of the Governor’s Highway Safety program website and without material changes except as to date, time and agencies involved, by the officer in charge, Officer Griffith, and with the designated subject described as “Checking Station Plan,” and that the memorandum was admitted as evidence in a *voir dire* evidentiary hearing as State’s Exhibit 1; (2) the checkpoint was conducted on a main thoroughfare of Kernersville and the location was selected, “taking into account the likelihood of detecting impaired drivers, the traffic conditions, the number of vehicles that would likely be stopped and the convenience and safety of the motoring public”; and (3) the checkpoint had a predetermined starting time of 11:00 p.m. on 6 July 2007 and a predetermined ending time of 3:00 a.m. on 7 July 2007. “While these findings do not necessarily address all of the non-exclusive factors suggested by *Veazey*, they do indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose, satisfying the second *Brown* prong.” *Jarrett*, — N.C. App. at —, — S.E.2d at —.

3. The severity of the interference with individual liberty

“The final *Brown* factor to be considered is the severity of the interference with individual liberty.” *Id.* at —, — S.E.2d at —. “[C]ourts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint’s objectives.” *Veazey*, 191 N.C. App. at 192, 662 S.E.2d at 690-91.

Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint’s potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers’ authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint[.]

Id. at 193, 662 S.E.2d at 691. “Our Court has held that these and other factors are not “lynchpin[s],” but instead [are] circumstance[s] to be

STATE v. NOLAN

[211 N.C. App. 109 (2011)]

considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.’” *Id.* (quoting *Rose*, 170 N.C. App. at 298, 612 S.E.2d at 345).

In the instant case, the trial court considered all of the relevant factors under the third *Brown* prong. These findings included: (1) the checkpoint’s location at the intersection of the 800 block of South Main Street and the 800 block of Old Winston Road in Kernersville, North Carolina, was predetermined and took into account the traffic conditions, the number of vehicles that would likely be stopped and the convenience and safety of the motoring public, and there was an adjustment to include the exit from the Interstate 40 Highway since some drivers were turning around to avoid the checkpoint; (2) the steps taken to put drivers on notice of the approaching checkpoint were that signs were set out at the checkpoint alerting all drivers to the checkpoint ahead; (3) the location for the checkpoint was selected and directed by Officer Griffith; (4) in accordance with the plan developed from the Governor’s Highway Safety Program, every vehicle was stopped and each driver was asked for a driver’s license and registration; (5) drivers could see visible signs of the officers’ authority because approximately thirty law enforcement officers, in twenty to twenty-five marked patrol cars with their blue lights flashing, were positioned at the checkpoint, and also stationary and temporary lighting was used to illuminate the area of the checkpoint; (6) all participating law enforcement officers operated the checkpoint pursuant to the written plan, which included Officer Griffith’s briefing all participants regarding the procedures, equipment, location, and times of operation of the checkpoint; (7) Officer Griffith was the “Officer-in-Charge” and the supervisor of all the officers participating in the checkpoint; and (8) officers from five separate law enforcement agencies cooperated to conduct the checkpoint and agreed to follow the plan. Officer Griffith remained in control of the checkpoint at all times. “These findings indicate the trial court adequately considered the appropriate factors under the third prong of *Brown*.” *Jarrett*, — N.C. App. at —, — S.E.2d at —.

“The trial court’s order denying defendant’s motion to suppress contained adequate findings of fact, supported by competent evidence, to satisfy the three prongs of the *Brown* test.” *Id.* at —, — S.E.2d at —. These findings in turn support the trial court’s conclusions of law that “the degree to which the seizure advances the public interest [are substantial and significantly outweigh] [] the severity of the interference with individual liberty” and “the [checkpoint], as

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

composed and implemented was not an unreasonable detention of drivers entering the subject checkpoint or of the Defendant in these circumstances” The trial court correctly determined that the KPD had a legitimate primary programmatic purpose for conducting a checkpoint and that the checkpoint was reasonable under the circumstances. Defendant’s issue on appeal is overruled.

V. CONCLUSION

Judge Hardin’s findings of fact were based upon competent evidence and supported the conclusion of law that the checkpoint, did not violate defendant’s Fourth and Fourteenth Amendment rights. Therefore, the trial court properly denied the first motion. Defendant never challenged Judge Burke’s failure to rule on the second motion or provided a basis unrelated to the checkpoint on which the second motion should have been granted. This issue is abandoned.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

THOMAS M. URQUHART, JR., ADMINISTRATOR OF THE ESTATE OF BETSY DERR
URQUHART, DECEASED, PLAINTIFF V. EAST CAROLINA SCHOOL OF
MEDICINE, DEFENDANT

No. COA10-1255

(Filed 19 April 2011)

1. Tort Claims Act— university medical school—medical negligence—collateral estoppel—jurisdiction

The Industrial Commission did not err by granting summary judgment in favor of defendant for a medical negligence claim that plaintiff brought pursuant to the State Tort Claims Act under N.C.G.S. §§ 143-291 to 300.1A based on the doctrine of collateral estoppel. Plaintiff’s challenges to the Commission’s order based on the nature of the proceedings leading up to the entry of the summary judgment order and the contents of that order lacked merit. Further, plaintiff’s “absence of jurisdiction” argument also lacked merit.

Appeal by plaintiff from order entered 7 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 March 2011.

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

*Thomas M. Urquhart, Jr., pro se, plaintiff-appellant.**Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.*

ERVIN, Judge.

Plaintiff Thomas M. Urquhart, Jr., the administrator of the estate of his deceased wife, Betsy Derr Urquhart, appeals from an order entered by the North Carolina Industrial Commission granting a summary judgment motion filed by Defendant East Carolina School of Medicine relating to a medical negligence claim that Plaintiff brought against Defendant pursuant to the State Tort Claims Act, N.C. Gen. Stat. § 143-291 to 300.1A (2009). After careful consideration of Plaintiff's challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

On 27 September 2000, Plaintiff filed a wrongful death suit in Pitt County Superior Court in which he alleged that Plaintiff's decedent died as the proximate result of the negligence of Pitt County Memorial Hospital and several specifically identified doctors and nurses. The individual defendant physicians subsequently moved for summary judgment on the grounds that Plaintiff's action had been brought against them in their official capacities as employees of a state hospital and that they were immune from suit pursuant to the doctrine of sovereign immunity. Although Judge W. Russell Duke, Jr., granted their summary judgment motion, this Court concluded that the defendant physicians were not entitled to rely on a sovereign immunity defense and reversed Judge Duke's decision. *See Urquhart v. Univ. Health Sys.*, 151 N.C. App. 590, 592, 566 S.E.2d 143, 145 (2002).

In January 2005, all defendants filed motions to disqualify Plaintiff's medical experts and for summary judgment. After conducting a hearing on the defendants' motions, Judge Clifton W. Everett, Jr., entered an order on 24 March 2005 concluding that "each of the expert witnesses designated by the Plaintiff and subsequently deposed by the Defendants pursuant to the discovery scheduling order, do not meet the requirements of Rule 702 of the North Carolina Rules of Evidence to be witnesses to give expert testimony on the appropriate standard of health care as defined in N.C. [Gen. Stat. §] 90-[21].12 in a medical malpractice action as defined by N.C. [Gen.

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

Stat. §] 90-21.11”; that, given the disqualification of Plaintiff’s expert witnesses, Plaintiff is “unable to offer a forecast of evidence that showed, through competent evidence and witnesses, that any of the health care services provided by any of the defendants was not in accordance with the standard of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act[s] giving rise to the cause of action;” and that summary judgment should be granted in favor of all the defendants. As a result, Judge Everett dismissed the Pitt County civil action with prejudice.¹

At approximately the same time that he filed the Pitt County civil action, Plaintiff initiated a proceeding before the Commission pursuant to the State Tort Claims Act in which he alleged that Defendant, “acting by and through its agents and employees, was negligent in the medical care and services rendered to” Plaintiff’s decedent and that the negligence of these individuals “proximately caused” her death. On 27 March 2009, Defendant moved for summary judgment on the grounds that Judge Everett’s decision to grant summary judgment in favor of the defendants in the Pitt County civil action barred, based on the doctrine of collateral estoppel, Plaintiff from maintaining a medical negligence claim against Defendant under the State Tort Claims Act.

On 6 May 2009, Defendant’s motion was heard before Deputy Commissioner George T. Glenn, II. On 13 July 2009, Deputy Commissioner Glenn entered an order denying Defendant’s motion. Defendant appealed Deputy Commissioner Glenn’s order to the Commission. On 7 July 2010, the Commission entered an order by Commissioner Staci T. Meyer, in which Commissioners Christopher Scott and Danny L. McDonald joined, concluding that Judge Everett had “ruled” in the Pitt County civil action that none of the defendants whose conduct was at issue in the State Tort Claims Act proceeding had “committed medical malpractice, or were otherwise negligent in their care of” Plaintiff’s decedent; that the “Superior Court[’s] dismissal with prejudice was a complete and final adjudication on the merits;” and that “[P]laintiff is collaterally estopped from alleging medical negligence by [D]efendant through alleged medical malpractice of its employees under the State Tort Claims Act.” As a result, the

1. According to Plaintiff’s brief, his attempted appeal from Judge Everett’s order was dismissed for non-compliance with the applicable provisions of the North Carolina Rules of Appellate Procedure and his subsequent *certiorari* petition was denied by this Court.

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

Commission granted Defendant's summary judgment motion. Plaintiff noted an appeal to this Court from the Commission's order.

II. Legal Analysis

On appeal, Plaintiff contends that the Commission erred by concluding that his claim against Defendant under the State Tort Claims Act was barred by the doctrine of collateral estoppel. In essence, Defendant argues that the doctrine of collateral estoppel has no application in this case because Judge Everett never made a determination of the type necessary to collaterally estop him from relitigating the negligence issue and because, even if Judge Everett made a valid determination otherwise entitled to preclusive effect, he lacked the jurisdiction to do so. We disagree.

A. Collateral Estoppel

“The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.” *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 591, 599 S.E.2d 422, 427 (2004) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)).

“Under the doctrine of *res judicata* or ‘claim preclusion,’ a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies Under the companion doctrine of collateral estoppel, also known as ‘estoppel by judgment’ or ‘issue preclusion,’ the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.”

Williams, 165 N.C. App. at 591, 599 S.E.2d at 427 (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal citations and quotations omitted). Thus, the doctrine of collateral estoppel bars “the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim.” *Id.* (quoting *Whitacre*, 357 N.C. at 15, 591 S.E.2d at 880). The doctrine of collateral estoppel has been applied when successive lawsuits are brought before different tribunals with

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

different jurisdictional authority, such as the tribunals at issue here. For example, we have held that:

Although plaintiff's present state court claims are different from those brought in federal court, his state court claims may contain issues previously litigated and determined in the federal court. Thus, plaintiff may be collaterally estopped from re-litigating these issues. To hold otherwise . . . would directly violate the underlying principle of judicial economy that precipitated the creation of the collateral estoppel and *res judicata* doctrines We reaffirm, therefore, that collateral estoppel may prevent the re-litigation of issues that are necessary to the decision of a North Carolina constitutional claim and that have been previously decided in federal court.

McCallum v. N. C. Coop. Extension Serv., 142 N.C. App. 48, 53-54, 542 S.E.2d 227, 232-33, *appeal dismissed and review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001) (citation omitted). "Collateral estoppel applies when the following requirements are met:

'(1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.' "

McCallum, 142 N.C. App. at 54, 542 S.E.2d at 233 (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)). As the Commission correctly determined, all of the necessary prerequisites for the application of the doctrine of collateral estoppel exist in this case.

On the one hand, the Pitt County civil action initiated by Plaintiff sought recovery of damages from a number of physicians and health care providers who did not qualify as state agencies for purposes of the State Tort Claims Act. On the other hand, his proceeding against Defendant, a state agency, was filed with the Commission under the State Tort Claims Act. Plaintiff's assertion of a right to recover compensation from Defendant under the State Tort Claims Act was predicated on alleged deviations from the applicable standard of care committed by the same defendant physicians whose conduct was at issue in the Pitt County civil action. *See Taylor v. Jackson Training School*, 5 N.C. App. 188, 191, 167 S.E.2d 787, 789 (1969) (stating that,

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

“[b]efore an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State”). As a result, both the Pitt County civil action and the State Tort Claims Act proceeding rested on the same allegation—that the defendant physicians deviated from the applicable standard of care in connection with their treatment of Plaintiff’s decedent. The only difference between the two proceedings is that, in the Pitt County civil action, Plaintiff sought damages from the defendant physicians in their individual capacity, while, in his State Tort Claims Act proceeding, Plaintiff sought damages from the State as the result of the alleged negligence of the same defendant physicians. Despite the fact that these two proceedings were initiated in and have been litigated in different tribunals and the fact that the two proceedings involved different parties, the validity of both proceedings hinges on Plaintiff’s ability to establish that the same defendant physicians deviated from the applicable standard of care in connection with their treatment of Plaintiff’s decedent. Thus, a common issue is central to both proceedings.

The remaining components of collateral estoppel are also present here. The Pitt County civil action ended when the Superior Court entered an order concluding that Plaintiff had failed to adduce competent medical evidence tending to show that the defendant physicians had deviated from the applicable standard of care in connection with the treatment that they provided to Plaintiff’s decedent and granting summary judgment against Plaintiff and in favor of the defendants, including the defendant physicians, on the grounds that Plaintiff had failed to forecast any evidence tending to show that the defendants acted negligently. “ ‘[I]n general, a cause of action determined by an order for summary judgment is a final judgment on the merits.’ ” *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008) (quoting *Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55, *aff’d per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000)). As a result, the trial court’s decision to grant summary judgment in favor of the defendant physicians in the Pitt County civil action constituted an adjudication on the merits of the issue of the extent to which the defendant physicians deviated from the applicable standard of care, which, as we have already established, is an issue critical to both the Pitt County civil action and the State Tort Claims Act proceeding. Moreover, this issue was material and relevant to the disposition of the Pitt County civil action, and the manner in which the trial court decided this issue was necessary and essential to the resulting judg-

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

ment. As a result, we conclude that each of the elements of a valid collateral estoppel is present in this instance.

B. Adequacy of the Superior Court's Determination

In seeking to persuade us that the Commission erred by concluding that his claims against Defendant were barred by the doctrine of collateral estoppel, Plaintiff contends that the Commission erroneously found that Judge Everett's decision to grant summary judgment in favor of the defendants in the Pitt County civil action "determined that the factual issue of whether the named defendants in the Superior Court case were negligent" on the grounds that Judge Everett "could [not] have made a determination of the disputed fact of negligence as part of a summary judgment hearing." In essence, Plaintiff appears to argue that Judge Everett had no authority to make a factual determination at the time that he granted summary judgment in favor of the defendant physicians in the Pitt County civil action and that only a determination made by means of a jury verdict or findings and conclusions made by a trial judge after a full hearing on the merits is entitled to preclusive effect under the doctrine of collateral estoppel. After carefully examining the arguments advanced in Plaintiff's brief, we conclude that this aspect of Plaintiff's position rests on a misapprehension of the nature of Judge Everett's order, the Commission's interpretation of that document, and the doctrine of collateral estoppel.

In his summary judgment order, Judge Everett stated, among other things, that:

. . . [B]ased upon the undisputed deposition testimony of the Plaintiff's expert witnesses Charles Vaughan, M.D., David Seignious, M.D. and Kimberly Warlick, R.N., . . . the expert witnesses designated by the Plaintiff and subsequently deposed by the Defendants . . . do not meet the requirements of Rule 702 of the North Carolina Rules of Evidence to be witnesses to give expert testimony on the appropriate standard of health care . . . in a medical malpractice action[;]

. . . [B]ased upon the undisputed evidence contained in the record . . . [.] the Plaintiff was unable to offer a forecast of evidence that showed, through competent evidence and witnesses, that any of the health care services provided by any of the defendants was not in accordance with the standard of practice among members of the same health care profession with similar training and expe-

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

rience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action;

In light of these determinations, Judge Everett concluded that:

[P]laintiff failed to offer any competent evidence at the summary judgment hearing to satisfy the requirements of N.C. [Gen. Stat. §] 90-21.12; and

[B]ased on the foregoing, . . . [,] there is now no genuine issue as to any material fact and . . . the Defendants are entitled to judgment [] as a matter of law.

Plaintiff's argument to the contrary notwithstanding, this language clearly shows that, rather than making an impermissible factual finding concerning the negligence of the defendant physicians, Judge Everett concluded as a matter of law that Plaintiff had failed to forecast competent and admissible evidence tending to show that the defendant physicians had deviated from the applicable standard of care in connection with their treatment of Plaintiff's decedent and that they were entitled to judgment as a matter of law for that reason. Such determinations resolve questions of law and are properly considered in evaluating the merits of a summary judgment motion.

According to well-established principles of North Carolina law, Judge Everett had ample authority to evaluate the competency and sufficiency of Plaintiff's evidentiary forecast in addressing the merits of the defendants' summary judgment motion. "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)). "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Id.* (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992)). Thus, nothing in our analysis of Judge Everett's summary judgment order indicates that he made an improper factual determination in the course of determining that summary judgment should be entered against Plaintiff and in favor of the defendant physicians.

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

Moreover, as we have already noted, “a cause of action determined by an order for summary judgment is a final judgment on the merits.” *Green*, 137 N.C. App. at 310, 528 S.E.2d at 55. In light of that basic legal principle, the Commission properly determined that Judge Everett’s decision to grant summary judgment in favor of the defendant physicians in the Pitt County civil action constituted “a complete and final adjudication on the merits.” Plaintiff neither acknowledges this general rule in his brief, nor argues that it does not apply in this instance. Instead, Plaintiff erroneously contends that the Pitt County summary judgment order does not constitute an adjudication on the merits because “neither side presented any evidence on the factual issue of negligence as to any of the defendants.” Plaintiff cites no authority in support of his implied assertion that the presentation of testimony and the resolution of factual conflicts by a jury verdict or by means of a trial judge’s findings of fact and conclusions of law is a necessary prerequisite to a valid adjudication on the merits for collateral estoppel purposes, and we know of none. On the other hand, the adoption of Plaintiff’s implicit position would completely eviscerate the well-established general rule that a summary judgment order constitutes a decision on the merits. As a result, we conclude that Plaintiff’s challenges to the Commission’s order based on the nature of the proceedings leading up to the entry of Judge Everett’s summary judgment order and the contents of that order lack merit.

C. Jurisdiction

In addition to arguing that Judge Everett’s order does not constitute a determination entitled to preclusive effect for collateral estoppel purposes, Plaintiff argues that Judge Everett’s order is not entitled to preclusive effect for jurisdictional reasons as well. As Plaintiff correctly notes, “[i]n analyzing collateral estoppel, the North Carolina Courts have restricted its application to issues over which the prior court had jurisdiction.” Thus, “[w]here the [tribunal] adjudicating the prior proceeding lacked jurisdiction over an issue, the [actually litigated and necessary] element of collateral estoppel has not been met.” *Gregory v. Penland*, 179 N.C. App. 505, 514, 634 S.E.2d 625, 631 (2006) (quoting *Meehan v. Cable*, 127 N.C. App. 336, 340, 489 S.E.2d 440, 443 (1997)). Accordingly, to the extent that a decision for which preclusive effect is claimed was made by a tribunal that lacked the authority to make that decision, such a decision cannot logically provide a valid basis for precluding the relitigation of that issue in a forum with the authority to determine the rights and liabilities of the parties. We conclude, however, that this principle, which is most

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

clearly articulated in the two cases upon which Plaintiff places principal reliance, has no bearing upon the proper resolution of this case.

In *Gregory*, the plaintiffs were injured while riding in a military vehicle driven by defendant's decedent, a National Guardsman activated as the result of a state of emergency declared by the Governor. The plaintiffs filed a civil suit against defendant's decedent in the Brunswick County Superior Court and a separate action against the North Carolina National Guard with the Commission under the State Tort Claims Act. According to N.C. Gen. Stat. § 166A-14(a):

Neither the State nor any political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker . . . complying with or reasonably attempting to comply with this Article or any order, rule or regulation promulgated pursuant to the provisions of this Article or pursuant to any ordinance relating to any emergency management measures enacted by any political subdivision of the State, shall be liable for the death of or injury to persons, or for damage to property as a result of any such activity.

Prior to resolution of the plaintiff's Superior Court claims, the Commission ruled in favor of the National Guard in the State Tort Claims Act case. The defendant argued that the plaintiffs' attempt to establish that the defendant's decedent was grossly negligent, and, therefore, liable for the personal injuries he allegedly inflicted on them was barred by the doctrine of collateral estoppel. We held that, since the Commission had no authority to find the National Guard liable on the basis of the gross negligence of the defendant's decedent, the Commission "lacked jurisdiction to address [the defendant's decedent's] gross negligence" and could not, for that reason, "properly make any findings on the parties' factual allegations." *Gregory*, 179 N.C. App. at 515, 634 S.E.2d at 632. As a result, we concluded that the Commission's determination with respect to the issue of whether the defendant's decedent's conduct constituted gross negligence did not collaterally estop the plaintiffs from relitigating the gross negligence issue in Superior Court. The gist of our decision in *Gregory* was that a ruling by a tribunal on an issue over which it lacks jurisdiction does not collaterally estop relitigation of that issue in a proper forum. In this case, however, the Pitt County Superior Court clearly had jurisdiction over the issue of whether the defendant physicians deviated from the applicable standard of care in connection with their treatment of Defendant's decedent, rendering our decision in *Gregory* inapplicable to a proper resolution of the present case.

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

Similarly, this Court's opinion in *Alt v. John Umstead Hospital*, 125 N.C. App. 193, 479 S.E.2d 800, *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997), upon which Plaintiff also relies, is readily distinguishable from the facts in the present case. In *Alt*, the plaintiff sought to recover "damages against individual physicians and officials at defendant hospital" based on claims sounding in malicious prosecution, false imprisonment, and deprivation of his constitutional and statutory rights. *Alt*, 125 N.C. App. at 194, 479 S.E.2d at 801. In Superior Court, summary judgment was granted for the defendants. Subsequently, the plaintiff initiated a proceeding in the Commission against the hospital under the State Tort Claims Act on the basis of alleged medical negligence. Before the Commission, the hospital argued that the Superior Court's decision to grant summary judgment in favor of the defendants in the civil action barred the plaintiff from arguing a negligence claim against the hospital under the State Tort Claims Act on *res judicata* and collateral estoppel grounds. This Court first noted that "the second requirement that the issues in the two actions be identical is not met" because, "[i]n plaintiff's first action, the dispositive issues[] were whether a criminal proceeding initiated against plaintiff was terminated in his favor, and whether the individual defendants, who were employees of defendant hospital, restrained defendant in violation of requisite procedures and in the exercise of professional judgment," while, "[i]n the instant action, the dispositive issue is whether the actions of defendant's employees conformed to the applicable standards of medical practice among members of the same health care profession with similar training and experience." *Alt*, 125 N.C. App. at 198, 479 S.E.2d at 803-04. In addition, we stated that "the third requirement that the issue must have been raised and actually litigated is not satisfied" because, "[p]ursuant to the State Tort Claims Act, exclusive original jurisdiction of claims against the State or its institutions and agencies, in which injury is alleged to have occurred as a result of the negligence of an employee of the State, is vested in the . . . Commission" and that "plaintiff's negligence claim against defendant could not have been adjudicated in the prior proceeding because the Superior Court has no jurisdiction over a tort claim against the State." *Alt*, 125 N.C. App. at 198, 479 S.E.2d at 804. In other words, we rejected the hospital's effort to rely on the doctrine of collateral estoppel in the State Tort Claims Act proceeding because the issue of the hospital's negligence had not been raised in the Superior Court and, in any event, because the Superior Court would not have had jurisdiction over any such claim against the hospital.

URQUHART v. EAST CAROLINA SCH. OF MED.

[211 N.C. App. 124 (2011)]

Like *Gregory*, *Alt* is distinguishable from the present case. First, unlike the situation at issue in *Alt*, the issue in dispute between Plaintiff and the defendant physicians in the Pitt County civil action, which revolved around the extent to which the defendant physicians deviated from the applicable standard of care, is identical to the issue in dispute in this case, which is whether Defendant is liable to Plaintiff on the basis of the same alleged deviation from the applicable standard of care by the same individuals. Secondly, while it is certainly true that a direct claim against the hospital could not have been properly litigated in the Pitt County civil action, no effort to litigate such a claim was made before that tribunal. Put another way, while *Alt* would clearly preclude the Commission from relying, in the present case, on a determination made in connection with a claim asserted against Defendant in the Pitt County civil action based on the Commission's exclusive jurisdiction under the State Tort Claims Act, no such determination is at issue here. Instead, the issue addressed in the Pitt County civil action was whether the defendant physicians, whose liability must be established in order for Plaintiff to successfully assert his claim against Defendant under the State Tort Claims Act, had deviated from the applicable standard of care in connection with their treatment of Plaintiff's decedent. Moreover, nothing in *Alt* suggests that, had the issue of the defendant physicians' negligence actually been litigated in the Superior Court action, collateral estoppel principles would not have precluded relitigation of the same issue before the Commission. As a result, contrary to Plaintiff's contention, our decision in *Alt* does not compel the result that Plaintiff urges us to reach, which is contrary to established collateral estoppel principles.

We conclude that, although Plaintiff's claim against Defendant was not litigated in the Pitt County civil action, the issue of the extent to which the defendant physicians deviated from the applicable standard of care was properly and actually litigated before the Pitt County Superior Court. Since Plaintiff's claim under the State Tort Claims Act is based entirely on the theory that Defendant is derivatively liable for the alleged failure of the same physicians whose conduct was at issue in the Pitt County civil action to comply with the applicable standard of care and since the extent to which these same individuals deviated from the applicable standard of care in connection with their treatment of Plaintiff's decedent was addressed and decided in the Pitt County civil action, neither *Gregory* nor *Alt* is controlling on these facts. As a result, Plaintiff's "absence of jurisdiction" argument in opposition to the Commission's decision lacks merit as well.

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

III Conclusion

For the reasons set forth above, we conclude that the Commission properly granted summary judgment in favor of Defendant with respect to Plaintiff's State Tort Claims Act claim. The extent to which Plaintiff forecast competent and sufficient evidence tending to show that the defendant physicians deviated from the applicable standard of care in connection with their treatment of Plaintiff's decedent was properly before the trial court in the Pitt County Superior Court action. Judge Everett's summary judgment order, which concluded that Plaintiff failed to present any competent evidence of negligence on the part of the physician defendants, constituted a valid adjudication on the merits. The claim asserted in Plaintiff's State Tort Claims Act action is predicated on the assertion that Plaintiff's decedent was injured by the negligence of the same defendant physicians whose conduct was at issue in the Pitt County civil action. In view of the fact that Judge Everett's summary judgment order resolved this issue against Plaintiff, Plaintiff is collaterally estopped from attempting to relitigate it before the Commission, a result which would be fatal to any attempt by Plaintiff to recover damages under the State Tort Claims Act. As a result, we conclude that the Commission's order granting summary judgment in favor of Defendant should be, and hereby is, affirmed.

AFFIRMED.

Judges ROBERT C. HUNTER and STEPHENS concur.

REGGIE L. CRENSHAW, PLAINTIFF v. ALAINA D. WILLIAMS, F/K/A ALAINA
CRENSHAW DEFENDANT

No. COA10-720

(Filed 19 April 2011)

**1. Child Custody and Support— foreign support order—
improper modification**

The trial court lacked authority to modify a Michigan child support order, and the portion of the trial court's order modifying defendant mother's support obligation was reversed.

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

2. Child Custody and Support— foreign custody order—modification—substantial change in circumstances—best interests of child

The trial court did not abuse its discretion by modifying a Michigan child custody order. The evidence revealed substantial changes in circumstances affecting the welfare of the minor children and that modification was in the best interests of the children.

Appeal by defendant from order entered 6 July 2009 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 24 January 2011.

Todd W. Cline, P.A., by Todd W. Cline, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom III, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Alaina D. Williams (formerly Crenshaw) appeals from the trial court's order modifying a custody order entered in Michigan and granting plaintiff Reggie L. Crenshaw primary custody of the couple's two sons, Jhавon-Gabriel and Christian. After careful review, we reverse in part and affirm in part.

Facts

On 15 August 2002, the Circuit Court for Wayne County, Michigan entered a "Judgment of Divorce" (the "Michigan divorce judgment"), which granted the parties a divorce and awarded them "joint legal and joint physical custody" of the juveniles. Under the terms of the judgment, "primar[y]" custody of the juveniles was with Ms. Williams for the first three years after entry of the Michigan divorce judgment (August 2002-August 2005) and then alternated to Mr. Crenshaw for the second three-year period (August 2005-August 2008). At the time of the couple's divorce, Mr. Crenshaw was living in Dearborn, Michigan and Ms. Williams was living in Norcross, Georgia, near Atlanta. Mr. Crenshaw moved to Charlotte, North Carolina shortly after the Michigan divorce judgment was entered.

When Ms. Williams refused to "agree to the switch" in custody in 2005, Mr. Crenshaw filed a motion in Michigan state court requesting enforcement of the terms of the Michigan divorce judgment. After holding a hearing on 15 August 2005, the Michigan circuit court entered an "Order for Change of Custody" (the "Michigan custody

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

order”) on 6 September 2005, in which the court determined that “it was in the best interests of the minor children to enforce the custody agreement set forth in the [Michigan divorce judgment]” The custody order also directed Ms. Williams to pay child support to Mr. Crenshaw while he had primary custody. Mr. Crenshaw has retained custody of Jhavon and Christian since entry of the 2005 Michigan custody order.

Mr. Crenshaw married Myra McCaskill on 9 June 2007. Ms. McCaskill helps parent Jhavon and Christian, including helping them with their homework, driving them to and from activities, buying them clothes, and cooking meals for them. Mr. Crenshaw and Ms. McCaskill have been members of the PTA Boards of their sons’ schools and have participated on the schools’ Leadership Teams. Ms. Williams has not volunteered at her sons’ schools since they moved to Charlotte to live with their father.

Mr. Crenshaw and Ms. McCaskill also encourage and support the children’s participation in sports. Mr. Crenshaw has helped coach football teams on which the boys played and paid for Christian to attend a football camp in the Atlanta area during the summer of 2008.

Ms. Williams has had “sporadic employment” since August 2005, working as an insurance adjuster, substitute teacher, waitress, and working for her family’s home renovation business. Ms. Williams is currently unemployed and living off of her savings. Her parents own the townhome in which she lives and allow her to live there rent-free in exchange for working for the family business.

Since August 2005, Ms. Williams has missed four or five visits with Jhavon and Christian. On some weekend visits, Ms. Williams will give up spending Friday nights with the children because Saturday morning flights typically are less expensive.

Ms. Williams is late for “the majority” of exchanges, often returning Jhavon and Christian to Charlotte after 9:00 p.m. on Sunday nights. When she does not return them on Sunday nights, Ms. Williams will leave Norcross around 3:00 a.m. and drive the children directly to their schools in Charlotte. When Jhavon and Christian return from visiting their mother, they typically are “exhausted” and Mr. Crenshaw and Ms. McCaskill are left to “deal with the ramifications of the exhaustion.”

Mr. Crenshaw and Ms. Williams are “[r]arely” able to agree on issues involving their children. Because Ms. Williams often yells and

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

curses at Mr. Crenshaw on the telephone, he usually resorts to communicating with her through email. Although Mr. Crenshaw notifies Ms. Williams through email about Jhavon's and Christian's activities, she does not fully participate in the activities.

The parties also differ regarding dietary habits, health care, and time spent with the children. Ms. Williams does not support the children seeing medical doctors and they often come home to Charlotte sick. While Mr. Crenshaw disciplines Jhavon and Christian by taking away their privileges, Ms. Williams does not discipline them because they "see eye to eye" on most issues.

Mr. Crenshaw's position with Wachovia was eliminated in November 2008, but he obtained employment that same month with ServiceMaster, which is headquartered in Memphis, Tennessee. On 3 November 2008, Mr. Crenshaw registered the 2002 Michigan divorce judgment and 2005 custody order in Mecklenburg County, requesting modification of custody and child support. At the time of the 6 April and 17 June 2009 hearings on Mr. Crenshaw's motions in Mecklenburg County District Court, Mr. Crenshaw planned on moving his family to the Memphis area in late June or early July of 2009.

The district court entered an order on 6 July 2009, concluding that "Mr. Crenshaw ha[d] met his burden of showing that a change in circumstances actually has occurred, and that the changes have affected the welfare of Jhavon and Christian" and awarding him "primary custody" of the children. The court also concluded that Ms. Williams should pay \$454 per month in child support; that she was currently \$16,400 in arrears; and that she should pay an additional \$100 per month "towards retirement of the arrearage." Ms. Williams filed numerous post-trial motions, including a "Motion for New Trial and to Amend Findings of Fact," a "Motion for Relief from Child Support Order and for Sanctions," and a "Motion to Extract Fraudulent Evidence." The trial court denied Ms. Williams' motions on 26 October 2009. Ms. Williams timely appealed to this Court.

Support

[1] Ms. Williams first contends that the Michigan child support order was not properly registered under the Uniform Interstate Family Support Act ("UIFSA"), codified in Chapter 52C of the North Carolina General Statutes, and thus "the trial court lacked authority to address the issue of child support." Whether the trial court complied with the registration procedures set out in UIFSA is a question of law

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

reviewed de novo on appeal. *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007).

UIFSA, enacted in North Carolina in 1995, was “promulgated and intended to be used as [a] procedural mechanism[] for the establishment, modification, and enforcement of child and spousal support obligations.” *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997); accord *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 243, 578 S.E.2d 610, 613-14 (2003) (“Enacted by states as a mechanism to reduce the multiple, conflicting child support orders existing in numerous states, UIFSA creates a structure designed to provide for only one controlling support order at a time [.]”).

Under UIFSA, a child support order is first entered by the “issuing tribunal” in the “issuing state.” N.C. Gen. Stat. § 52C-1-101(9) and (10) (2009); *Hook v. Hook*, 170 N.C. App. 138, 141, 611 S.E.2d 869, 871, *disc. review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005). N.C. Gen. Stat. § 52C-6-609 (2009) establishes that if an obligee wants to modify an order against an obligor who resides in a different state, the obligee must “register” the order in the state in which the obligor resides. See N.C. Gen. Stat. § 52C-6-609 cmt. (“A petitioner wishing to register a support order of another state for purposes of modification must . . . follow the procedure for registration set forth in [N.C. Gen. Stat. § 52C-6-602 (2009)],” which requires registration in “the tribunal for the county in which the obligor resides in this State[.]”).

It is undisputed in this case that Ms. Williams is not a resident of North Carolina; she resides in Georgia. Consequently, Mr. Crenshaw, as the party seeking modification in this case, was required by N.C. Gen. Stat. §§ 52C-6-602 and -609 to register the Michigan support order in Georgia, not North Carolina:

In the overwhelming majority of cases, the party seeking modification must seek that relief in a new forum, almost invariably the State of residence of the other party. This rule applies to either obligor or obligee, depending on which of those parties seeks to modify. . . .

. . . . This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party. . . . In short, the obligee is required to register the existing order and seek modification of that order in a State which has personal jurisdiction over the

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

obligor other than the State of the obligee's residence. Most typically this will be the State of residence of the obligor. . . .

N.C. Gen. Stat. § 52C-6-611 cmt (2009). As North Carolina is not the proper forum for modifying the Michigan support order, the trial court lacked the authority to modify that order. *See Lacarrubba v. Lacarrubba*, — N.C. App. —, —, 688 S.E.2d 769, 773 (2010) (concluding North Carolina court “lacked authority to modify [New York child support] order or reduce arrearages” where obligee, who resided in Florida, registered foreign order in North Carolina for “enforcement only” and obligee did not consent to personal jurisdiction in North Carolina). Consequently, the portion of the trial court's order modifying Ms. Williams' child support obligations is reversed.

Custody

[2] Ms. Williams also contends that the trial court erred in modifying the Michigan custody order. N.C. Gen. Stat. § 50-13.7(b) (2009) provides that “when an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.” As a threshold issue, we note that the trial court had subject-matter jurisdiction under N.C. Gen. Stat. § 50A-203(2) (2009) to modify the Michigan custody order as the record indicates that North Carolina was the juveniles' “home state” at the time this custody action was initiated, *see* N.C. Gen. Stat. § 50A-102(7) (2009), and neither the juveniles nor their parents continued to reside in Michigan. *See In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473 (holding trial court had jurisdiction to modify South Carolina custody order where “the child and a parent . . . lived in North Carolina for the six months immediately preceding the commencement of the proceeding” and “the child and both parents had left South Carolina at the time of the commencement of the proceeding”), *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).

Our Courts have interpreted N.C. Gen. Stat. § 50-13.7(b) as authorizing trial courts to modify a foreign custody order if the party moving for modification shows that “ ‘a substantial change of circumstances affecting the welfare of the child’ ” warrants a change in custody. *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)). “The party seeking the custody change has the burden of showing the requisite change.” *Metz v. Metz*, 138 N.C. App. 538, 540, 530 S.E.2d 79,

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

80 (2000). In determining whether modification is warranted, the trial court engages in a two-step analysis: the court first determines whether there has been a substantial change in circumstances affecting the welfare of the child involved, and, if so, the court then determines whether modification of custody is in the child's best interest. *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003).

When reviewing a trial court's order modifying custody, the appellate court must determine whether the trial court's findings are supported by substantial evidence and, in turn, whether the court's findings support its conclusions of law. *Id.* If supported by substantial evidence, the trial court's findings are binding on appeal, despite the existence of evidence that might support contrary findings. *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903. Unchallenged findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court's conclusions of law, however, are reviewed de novo. *Scott v. Scott*, 157 N.C. App. 382, 385, 579 S.E.2d 431, 433 (2003). " '[T]he trial court is vested with broad discretion in cases involving child custody,' and its decision [to modify custody] will not be reversed on appeal absent a clear showing of abuse of discretion." *Karger v. Wood*, 174 N.C. App. 703, 705, 622 S.E.2d 197, 200 (2005) (quoting *Pulliam*, 348 N.C. at 624-25, 501 S.E.2d at 902) (second alteration added).

Ms. Williams first contends that "the trial court's decision regarding child support tainted its concurrent decision regarding custody modification[.]" In support of her argument, Ms. Williams points to Lee's North Carolina Family Law, where Professor Suzanne Reynolds explains: "[I]t is the law of child support, not custody, that should address disparities in standards of living. If the better custodian cannot provide for the child's economic needs, then an award of child support—not a disposition of custody—should address those needs." Suzanne Reynolds, 3 *Lee's North Carolina Family Law* § 13.29 (5th ed. 2002) [hereinafter *Lee's Family Law*]; see also *Jolly v. Queen*, 264 N.C. 711, 715, 142 S.E.2d 592, 596 (1965) (observing that if a trial court were permitted to base a custody determination on comparative standards of living, "a judge might find it to be in the best interest of a legitimate child of poor but honest, industrious parents, who were providing him with the necessities, that his custody be given to a more affluent neighbor or relative who had no child and desired him").

Professor Reynolds further explains, however, that, while "the law of custody discourages the making of custody decisions based on relative standards of living[.]" it is "not error for the [court's] findings

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

to include these comparisons” so long as its findings “reveal that other factors were more important.” *Lee’s Family Law* § 13.29. Here, in addition to making findings regarding the parties’ respective incomes and standards of living, the trial court also made findings addressing: Mr. Crenshaw (and Ms. McCaskill’s) level of involvement in Jhavan’s and Christian’s education and extra-curricular activities, and Ms. Williams’ lack of “full[] participat[ion]” in the boys’ activities; Ms. Williams’ missing four or five visits per year with her children and her election to “forgo” Friday nights during some weekend visits; Ms. Williams’ returning the boys “exhausted” at the end of weekend visits; Ms. Williams’ disapproval of the children seeing medical doctors and her returning the boys “with colds”; and Mr. Crenshaw’s disciplining the boys by taking away their privileges and Ms. Williams’ not disciplining them.

The trial court’s findings demonstrate that it considered factors beyond the parties’ relative incomes and standards of living in determining whether there had been a substantial change in circumstances affecting the children’s welfare. *See Metz*, 138 N.C. App. at 541, 530 S.E.2d at 81 (“affirming trial court’s order finding a substantial change of circumstances affecting the child’s welfare where, in addition to considering parents’ relative standards of living, trial court made findings regarding other factors, including child’s educational and developmental needs and custodial parent’s work schedule); *see also White v. White*, 90 N.C. App. 553, 558, 369 S.E.2d 92, 95 (1988) (“Plaintiff argues that she is being denied custody of her child because defendant has a greater income. We disagree. Defendant’s income and stable home environment simply provide part of the basis for determining that the child’s best interests and welfare will be promoted by awarding custody to defendant.”).

Ms. Williams next contends that “[s]everal of the trial court’s findings of fact lack competent evidentiary support.” She complains of various “nuanced discrepancies between the evidence and factual findings,” contending, for example, that there is no evidentiary support for the date stated in the order regarding Mr. Crenshaw’s and Ms. McCaskill’s marriage; that, contrary to the court’s characterization of the evidence, her written request for an extension to respond to Mr. Crenshaw’s petition for registration constitutes a “response”; that, contrary to the court’s characterization, she did not “cancel[]” four to five visits a year, she simply “miss[ed]” four to five visits a year; that the court’s description of Mr. Crenshaw and Ms. McCaskill having to “deal” with the boys being “exhausted” when she drives them directly

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

to school in Charlotte from Atlanta is a “stretch[.]”; and, that, contrary to the court’s statement that the “present custody schedule is not working well,” it is only the “present exchange procedure” that is “problematic.”

Assuming, without deciding, that the challenged findings are not supported by evidence in the record, Ms. Williams, as the appellant, “must not only show error, but also that the error is material and prejudicial, amounting to a denial of a substantial right and that a different result would have likely ensued.” *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 281, 346 S.E.2d 168, 171 (1986), *disc. review denied*, 318 N.C. 692, 351 S.E.2d 741 (1987). Ms. Williams fails to provide any explanation as to how any of these “nuanced discrepancies” are material or prejudicial. This argument is overruled.

Ms. Williams also argues that the trial court’s findings do not support its conclusion that Mr. Crenshaw satisfied his burden of proving that a substantial change of circumstances affecting the children’s welfare has occurred. Ms. Williams argues that Mr. Crenshaw failed to demonstrate a substantial change in circumstances because “the disparity in the parties’ respective stability” was the basis for the 2005 Michigan custody order that “switched” custody from Ms. Williams to Mr. Crenshaw and there has been no change in the parties’ respective “financial and occupational stability.” Our courts have held that when the circumstances existing at the time of the request for modification are the same as the circumstances at the time of the initial custody determination, the trial court lacks the basis to modify the initial custody order. *See Tucker v. Tucker*, 288 N.C. 81, 88, 216 S.E.2d 1, 5 (1975) (“There is no evidence in this record of any substantial change in conditions affecting the welfare of Timmy between 7 June 1974 and 7 August 1974. The friction between the parents had existed from the date of the first custody order in 1973.”); *Ford v. Wright*, 170 N.C. App. 89, 96, 611 S.E.2d 456, 461 (2005) (“As the trial court had already considered the parties’ past domestic troubles and communication difficulties in the prior order, without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error.”); *see also Lee’s Family Law* § 13.106(b) (explaining that if “the existing facts are no different from the facts before the court at the time of the previous order, then the court has no basis to modify the order”).

As the trial court’s findings indicate, the evidence in this case reveals material changes in the circumstances—with respect to the

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

parties' comparative stability as well as other considerations—between the time of the hearing resulting in the Michigan custody order and the modification proceedings in this case. Here, the court specifically found that since entry of the Michigan custody order “Mr. Crenshaw and Ms. McCaskill, his present spouse, have been members of PTA Boards at each child’s school, and they have participated on the schools’ Leadership Teams” and that “Ms. Williams has not volunteered at the minor children’s schools”; that “Mr. Crenshaw has helped coach football teams on which the boys played, and he and Ms. McCaskill encourage and support the sports in which the children participate”; that Ms. McCaskill “assists with parenting” the children, helps them with their homework, provides transportation, and generally helps take care of them; that although Mr. Crenshaw’s position with Wachovia was eliminated, he found other employment and “[h]is prospects for future employment in the position are good”; that his “monthly income totals \$20,833” and that he is able to pay for the children’s insurance; that Mr. Crenshaw has shown financial and “vocational stability” while Ms. Williams’ average monthly income over the past three years is \$1,584 and she is currently unemployed; that since August 2005, Ms. Williams misses roughly four or five visits with her sons each year and often forgoes the Friday night portion of weekend visits because “flights typically are less expensive when the children leave Charlotte on a Saturday”; that “Ms. Williams is late for the majority of exchanges,” often not returning the boys to Charlotte until after 9:00 p.m. on Sunday nights before school or leaving the Atlanta area around 3:00 a.m. Monday mornings and driving the boys directly to their schools; that “[w]hen the children return from visiting Ms. Williams, they typically are exhausted, and Mr. Crenshaw and Ms. McCaskill have to deal with the ramifications of the exhaustion”; that “Ms. Williams does not support the children seeing medical doctors, and they often return to Charlotte with colds”; that while Mr. Crenshaw disciplines the boys by restricting their privileges, Ms. Williams does not discipline them; that although Ms. Williams has “spent good quality time” with her children, she has not visited with them “consistent[ly]”; that while Mr. Crenshaw advises Ms. Williams of the boy’s activities, she “has not fully participated in these activities”; and, that the “minor children are bright, well mannered [sic] and well-adjusted” and are “involved in their respective schools, in sports and in the community.”

These unchallenged findings support the trial court’s conclusion that “Mr. Crenshaw has met his burden of showing that a change in circumstances actually has occurred, and that the changes have

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

affected the welfare of Jhavon and Christian.” See *Shipman*, 357 N.C. at 480-81, 586 S.E.2d at 257 (concluding that “culmination of a series of developments that occurred after the original custody decree” established “substantial change in circumstances” where father “secured new employment,” father owned a house with girlfriend, father and girlfriend could “provide for the child,” and girlfriend helped take care of child). This contention is overruled.

Ms. Williams further argues that the trial court’s findings fail to indicate that the court considered the impact on the children’s welfare of Mr. Crenshaw’s planned relocation to Memphis. Ms. Williams is correct that a parent’s relocation is not, without more, “a substantial change in circumstances affecting the welfare of the child which justifies a modification of a custody decree.” *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000). Rather, where a parent relocates, “the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstance.” *Gordon v. Gordon*, 46 N.C. App. 495, 500, 265 S.E.2d 425, 428 (1980), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

Here, the trial court’s uncontested findings establish that the court considered the impact of the relocation on the boys’ welfare. Specifically, the court found that Mr. Crenshaw took a job with ServiceMaster in Memphis after he lost his job with Wachovia in Charlotte and that he plans to relocate his family to the Memphis area because “[h]is prospects for future employment in this position are good” and his monthly salary of \$20,833 allows him to “support the children financially.” This argument is overruled.

Ms. Williams also argues that the trial court’s findings regarding “the parties’ purported difficulties concerning communication and visitation” fail to support its conclusion that the children’s welfare has been affected by a substantial change in circumstances. With respect to this issue, the court’s findings indicate that, since entry of the Michigan custody order, Ms. Williams has missed four to five visits with her children a year; that, during weekend visits, she will “forgo” having the children on Friday nights because it is cheaper for the children to fly to Atlanta on Saturdays; that she is “late for the majority of exchanges, oftentimes returning the children to Charlotte after 9 pm on a Sunday night before school resumes”; that when she fails to return the children on Sundays, she will “leave [Atlanta] around 3 am and drive the children directly to their schools in

CRENSHAW v. WILLIAMS

[211 N.C. App. 136 (2011)]

Charlotte”; that the boys are “exhausted” after visiting with Ms. Williams and it is “Mr. Crenshaw and Ms. McCaskill that have to deal with the ramifications of the exhaustion”; that “[t]he parties’ communication about the children is dysfunctional” and that they are “[r]arely . . . able to resolve issues regarding the children,” including “dietary habits, health care and time with the children”; that “Ms. Williams does not support the children seeing medical doctors,” and the children often are sick when they return to Charlotte; and, that Ms. Williams does “not fully participate[]” in the children’s activities despite being notified of them by Mr. Crenshaw. Contrary to Ms. Williams’ argument, these findings reveal how the parties’ communication and visitation “problems” affect the children’s welfare.

In her final argument on appeal, Ms. Williams challenges the trial court’s conclusion that modification of the Michigan custody order and granting Mr. Williams primary custody is “in the best interests of Jhavon and Christian.” Although Ms. Williams asserts that the trial court’s “best interests” determination is not supported by the evidence or its findings, where, as here, the appellate court “determine[s] that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child’s best interests, [the appellate court] will defer to the trial court’s judgment and not disturb its decision to modify an existing custody agreement.” *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. Consequently, that portion of the trial court’s order modifying custody is affirmed.

Reversed in part; affirmed in part.

Chief Judge MARTIN and Judge THIGPEN concur.

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

L&S WATER POWER, INC., BROOKS ENERGY, L.L.C., DEEP RIVER HYDRO, INC.,
HYDRODYNE INDUSTRIES LLC, WILLIAM DEAN BROOKS, AND HOWARD
BRUCE COX, PLAINTIFFS V. PIEDMONT TRIAD REGIONAL WATER AUTHORITY,
DEFENDANT

No. COA10-1063

(Filed 19 April 2011)

**1. Appeal and Error— interlocutory orders and appeals—
substantial right**

Although the trial court's order was interlocutory since it left the amount of compensation to be resolved, orders under N.C.G.S. § 40A-47 are immediately appealable as affecting a substantial right.

**2. Waters and Adjoining Lands— riparian rights—eminent
domain—just compensation**

The trial court did not err by determining that defendant had taken plaintiffs' riparian rights and that plaintiffs were entitled to compensation from defendant for the taking. Although the impoundment statutes and NC Environmental Management Commission (EMC) certificate authorized defendant to exercise its power of eminent domain by diverting the water flow in a river in order to develop a public water supply, defendant was obligated to pay just compensation. Further, plaintiffs introduced the necessary evidence to determine the rate of water flow.

**3. Administrative Law— exhaustion of administrative remedies—
not required—inverse condemnation compensation**

The trial court did not err by concluding that plaintiffs had no administrative remedies to exhaust before bringing their inverse condemnation claim against defendant. Plaintiffs were not challenging the EMC certificate or defendants' right to exercise eminent domain, but were asking only to be compensated as a result of the diverted waters.

**4. Damages and Remedies— calculation of compensation—
capitalization of income approach—partial taking**

The trial court did not err by concluding that the capitalization of income approach used by the trial court was a reasonable method to calculate plaintiffs' compensation for a partial taking.

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

Appeal by defendant from order entered 26 October 2009 by Judge Calvin E. Murphy in Guilford County Superior Court; and Findings of Fact and Conclusions of Law on Defendant's Motion for Relief from Order and Certification of Action by Trial Court on Remand entered 10 May 2010 by Judge Clarence E. Horton, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 10 February 2011.

Boydoh Law Group, by J. Scott Hale, for plaintiff appellees.

Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson and Christopher C. Finan; and Hunton & Williams, LLP, by Charles D. Case, for defendant appellant.

North Carolina League of Municipalities General Counsel Kimberly S. Hibbard, Senior Assistant General Counsel Gregory F. Schwitzgebel, III, and City of Raleigh Associate City Attorney Daniel F. McLawhorn, Amicus Curiae.

Water and Sewer Authority of Cabarrus County, by Hartsell & Williams, P.A., by Fletcher L. Hartsell, Jr., and Christy E. Wilhelm, Amicus Curiae.

McCULLOUGH, Judge.

Defendant Piedmont Triad Regional Water Authority ("defendant") appeals from an order of the Guilford County Superior Court which held that defendant had taken plaintiffs' riparian rights and that plaintiffs were entitled to compensation for defendant's taking. After careful review, we affirm the order of the trial court.

I. Background

Defendant is a public water authority that is comprised of Randolph County and the municipalities of Greensboro, High Point, Jamestown, Archdale, and Randleman. Defendant was organized under N.C. Gen. Stat. § 162A-3.1 to develop a public water supply for the Piedmont Triad region of North Carolina to satisfy its projected water demand for the next 50 years or more. Plaintiffs L&S Water Power, Inc., Brooks Energy, L.L.C., Deep River Hydro, Inc., Hydrodyne Industries LLC and Howard Bruce Cox (collectively "plaintiffs") are downstream riparian owners who operate hydroelectric power plants on the Deep River.¹

1. The Complaint was initially brought on behalf of seven hydroelectric power plants, two of which were non-operational. The trial court held that the plaintiffs own-

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

On 18 August 1988, defendant petitioned the North Carolina Environmental Management Commission ("EMC"), pursuant to N.C. Gen. Stat. §§ 162A-7 and 153A-285 (both repealed), to use the power of eminent domain to divert water from the Deep River basin to construct Randleman Lake. On 21 February 1992, the EMC issued a certificate (the "EMC certificate") authorizing defendant to acquire land by eminent domain and divert by inter-basin transfer up to 30.5 million gallons of water per day from the Deep River Basin to the Haw and Yadkin River Basins. In the EMC Certificate, the EMC found that the minimum average 7Q10 flow in the Deep River at the Randleman Lake impoundment is slightly less than 10 cubic feet per second.

In April of 2001, defendant received a 404 Permit from the Department of the Army authorizing it to construct the Randleman Dam. Defendant built the Randleman Dam and started filling the Randleman Lake in order to develop a public water supply ("the Randleman project").

On 29 May 2008, plaintiffs filed a complaint against defendant for inverse condemnation and asserted that defendants decreased the rate of water flow in the Deep River and sought compensation from defendant for the taking of their riparian rights. On 11 May 2009, defendant filed a Motion for Judicial Determination of Issues Other than Compensation pursuant to N.C. Gen. Stat. § 40A-47 (the "Motion"). The Motion was heard at the 28 July, 30 July, 23 September, and 24 September 2009 Sessions of Guilford County Superior Court.

On 26 October 2009, the trial court held that defendant had taken plaintiffs' riparian rights and that plaintiffs were entitled to compensation from defendant. Specifically, the trial court found that: (1) defendant used its power of eminent domain to build the Randleman project, in furtherance of developing a public water supply; (2) the Randleman project has and will continue to reduce the rate of water flow in the Deep River; (3) plaintiffs' ability to produce electricity has been negatively impacted by reduction of the natural stream flow of the Deep River. The trial court concluded that plaintiffs are entitled to be compensated for the loss of stream flow and that plaintiffs' riparian rights can be valued by the loss of electricity capable of being produced as a result of reduction of stream flow. Defendant filed notice of appeal on 23 November 2009.

ing non-operational plants could not recover from defendant. Those plaintiffs are not parties to this appeal.

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

II. Issues

Defendant appeals the trial court's determination that it had taken plaintiffs' riparian rights. Defendant contends that the trial court erred by (1) applying the common law doctrine of riparian rights without considering the EMC certificate or the impoundment statutes codified in N.C. Gen. Stat. § 143-215.44 to -215.50 (2009) (the "impoundment statutes"); (2) concluding that plaintiffs had no administrative remedies to exhaust before bringing their claim for inverse condemnation; and (3) determining that plaintiffs' compensation should be calculated by valuing the loss of electricity capable of being produced by each plaintiff as a result of the reduction in natural stream flow.

III. Appellate Review

[1] Because the trial court's order left the amount of compensation to be resolved, it is an interlocutory order. *See Concrete Machinery Co. v. City of Hickory*, 134 N.C. App. 91, 96-97, 517 S.E.2d 155, 158-59 (1999). Generally, there is no right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, this Court has held that orders under N.C. Gen. Stat. § 40A-47 are immediately appealable as affecting a substantial right. *See, e.g., Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 591, 572 S.E.2d 832, 834 (2002) (holding that the court's determination under N.C. Gen. Stat. § 40A-47 affected a substantial right). Thus, defendant's appeal is properly before this Court.

IV. Standard of Review

This matter came before the trial court as a result of defendant's motion under N.C. Gen. Stat. § 40A-47, which allows the court to determine all issues raised by the pleadings, other than the issue of compensation, including whether or not a taking has occurred. N.C. Gen. Stat. § 40A-47 (2009). This Court is bound by factual findings of the trial court, as long as the findings are supported by competent evidence. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 111, 338 S.E.2d 794, 799 (1986). We review the trial court's conclusions of law *de novo* on appeal. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

V. Taking of Plaintiffs' Riparian Rights

[2] Defendant appeals the trial court's conclusion of law that defendant had taken plaintiffs' riparian rights. Defendant claims that plain-

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

tiffs do not have a sufficiently defined interest in the rate of water flow in the Deep River and argues that the trial court improperly applied the common law doctrine of riparian rights without taking into account the EMC certificate or the impoundment statutes codified in N.C. Gen. Stat. §§ 143-215.44 to -215.50. We disagree and affirm the order of the trial court.

Defendant is a public authority that possesses the power of eminent domain. Eminent domain is “the power to divest right, title or interest from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title or interest divested.” N.C. Gen. Stat. § 40A-2(3) (2009). A condemnation or taking is the procedure used by the government for exercising its power of eminent domain. N.C. Gen. Stat. § 40A-2(1) (2009).

The Takings Clause of the Fifth Amendment of the United States Constitution provides that, when the government uses its power to take private property for a public use, the government must pay “just compensation” to the owner of the private property. U.S. Const. Amend. V. “The Fifth Amendment’s guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 1561 (1960).

The Fifth Amendment of the United States Constitution applies to the states through the Due Process clause of the Fourteenth Amendment. *Piedmont Triad Reg'l Water Auth.*, 154 N.C. App. at 592, 572 S.E.2d at 834. Although the North Carolina Constitution does not expressly prohibit the government from taking private property without just compensation, “the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina.” *Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4-5, 637 S.E.2d 885, 889 (2006) (internal quotation marks and citations omitted).

Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water. *In re Protest of Mason*, 78 N.C. App. 16, 24-25, 337 S.E.2d 99, 104 (1985). Defendant argues that, pursuant to *Dunlap v. Light Co.*, 212 N.C. 814, 195 S.E. 43 (1938), plaintiffs do not have a property interest in the natural flow of water and that a reduction in water flow is not a compensable taking. In *Dunlap*, a private landowner sought compensation from the power company for its exercise of eminent domain over waters of the

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

Yadkin River. *Id.* at 815-16, 195 S.E. at 44. In that case, the power company closed the flood gates of the dam at night, decreasing the amount of water in the stream's channel, and opened those gates in the morning, which accelerated the flow of water. *Id.* at 821, 195 S.E. at 48. The Supreme Court upheld the judgment of nonsuit for plaintiff's cause of action for taking his riparian rights. *Id.* at 822, 195 S.E. at 48.

However, *Dunlap* does not stand for the proposition that a reduction of flow is not compensable. The Supreme Court affirmed the judgment of nonsuit because the plaintiff in *Dunlap* was unable to show that the defendant's actions caused a permanent disturbance of the natural water flow. *Id.* at 821, 195 S.E. at 48. Plaintiffs' cause of action in the present case is not analogous to *Dunlap*, as plaintiffs were able to present evidence at trial that defendant's diversion of water has reduced and will continue to reduce the natural rate of flow in the Deep River.

Defendant contends that the trial court failed to properly apply the reasonable use doctrine. Under North Carolina's "reasonable use" rule, a riparian owner is entitled to the natural flow of a stream running through or along his land, undiminished and unimpaired in quality, except as may be caused by the reasonable use of water by other riparian owners. *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977); *see also Bruton v. Light Co.*, 217 N.C. 1, 9, 6 S.E.2d 822, 827 (1940) (holding that a riparian owner is entitled to make a reasonable use of water adjacent to his property as long as he does not injure the rights of downstream riparian owners). A landowner can only be held liable for interfering with the flow of surface waters, if the interference is "unreasonable and causes substantial damage." *Pendergrast*, 293 N.C. at 216, 236 S.E.2d at 796 (citation omitted). In *Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980), the trial court applied the reasonable use rule by instructing the jury to consider the damage from the diverted flood waters only if the State had "unreasonably interfered with the flow of surface waters." *Id.* at 705, 268 S.E.2d at 183. Our Supreme Court reversed and held that the reasonable use doctrine does not apply in condemnation proceedings, by explaining that:

the doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another. . . .

. . . Where the interference with surface waters is effected by [a government] entity, the principle of reasonable use articulated

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

in *Pendergrast* is superseded by the constitutional mandate that “[w]hen private property is taken for public use, just compensation must be paid.” *Eller v. Board of Education*, 242 N.C. 584, 89 S.E.2d 144 (1955).

Id. at 705-06, 268 S.E.2d at 183-84; *see also State of N.C. v. Hudson*, 665 F. Supp. 428, 447 (E.D.N.C. 1987) (“A municipal diversion of water for public water supply is not a riparian use, and if the diversion causes injury to downstream riparian owners the injury may be redressed in a court of law.”).

A. Impoundment Statutes and EMC Certificate

Defendant contends that the trial court incorrectly applied the common law doctrine of riparian rights by failing to take into account the EMC certificate or the impoundment statutes codified in N.C. Gen. Stat. § 143-215.44 to -215-50. We do not agree.

In 1971, the General Assembly enacted the impoundment statutes, which provide, in relevant part that “[a] person who lawfully impounds water for the purpose of withdrawal shall have a right of withdrawal of excess volume of water attributable to the impoundment.” N.C. Gen. Stat. § 143-215.44(a). The statutes also provide that “[a] person operating a municipal, county, community or other local water distribution or supply system and having a right of withdrawal may assert that right when its withdrawal is for use in any such water system as well as in other circumstances.” N.C. Gen. Stat. § 143-215.49. The EMC certificate authorized defendant to divert up to 30.5 million gallons of water per day from the Deep River basin to the Haw and Yadkin River basins.

Defendant claims that the impoundment statutes granted public authorities a “superior” right to withdraw excess water, such that the government is only obligated to compensate downstream riparian owners if its withdrawal of water exceeds the amount authorized in the EMC certificate. We cannot find any authority to support defendant’s argument.

Clearly, the impoundment statutes and the EMC certificate authorized defendant to exercise its power of eminent domain by diverting the water flow in the Deep River in order to develop a public water supply. The exercise of eminent domain in itself is a superior right over any private landowner. However, just because defendant is authorized to exercise its powers of eminent domain, it does not follow that defendant is relieved of the constitutional mandate to compen-

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

sate those whose property is taken. Nothing in the impoundment statutes or the EMC certificate states that defendant is not obligated to pay just compensation.

Furthermore, the impoundment statutes only grant defendant the right to withdraw “an excess volume of water” which is defined as the “volume which may be withdrawn from an impoundment . . . *without foreseeably reducing the rate of flow of a watercourse below that which would obtain in that watercourse if the impoundment did not exist.*” N.C. Gen. Stat. § 143-215.44(c) (emphasis added). In the present case, the trial court specifically found that the “filling of Randleman Lake and operation of Randleman Dam and Lake have and will reduce the rate of water flow in the Deep River below that which would obtain in the Deep River if [the Randleman project] did not exist.” Therefore, the trial court properly applied the common law doctrine of riparian rights to determine that defendant had taken plaintiffs’ riparian rights and that plaintiffs were entitled to compensation from defendant for the taking.

B. Average Annual Flow

Defendant assigns error to the following factual finding:

31. The average annual flow of the Deep River prior to the construction of Randleman Dam . . . was 163 cubic feet per second at or about the location of the Randleman Dam. The average annual flow in the Deep River is not now and never has been the flow known as the 7Q10, which sets forth the lowest average flow rate for 7 consecutive days during a ten year period.

“Where the trial judge sits as the trier of fact, ‘[t]he court’s findings of fact are conclusive on appeal if supported by competent evidence[.]’ ” *Gibson v. Faulkner*, 132 N.C. App. 728, 732-33, 515 S.E.2d 452, 455 (1999) (quoting *Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 858, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 485 (1985)). Even if there is evidence to the contrary, it is the ultimate decision of the court to determine the weight and credibility of conflicting evidence when different inferences may be drawn from the evidence. *Ferrell*, 79 N.C. App. at 111, 338 S.E.2d at 799. We conclude that the factual finding of the trial court is supported by competent evidence.

Defendant argues that the trial court erred by failing to use the 7Q10 to determine the average annual flow of the Deep River. The

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

7Q10 is the lowest average flow for seven consecutive days during a ten-year period. The 7Q10 for the Deep River is 10 cubic feet per second.

N.C. Gen. Stat. § 143-215.48(“) provides that when determining the rate of flow of water that would exist in the absence of an impoundment at issue, that rate shall be deemed to be 7Q10, “*unless a party to the litigation introduces a calculation that more closely approximates the actual rate.*” *Id.* (emphasis added). Plaintiffs introduced evidence at trial to support the factual finding that 163 cubic feet per second was a more accurate rate than the 7Q10. In addition to providing expert testimony about the average annual flow of the Deep River, plaintiffs submitted Environmental Impact Statements which calculated the average annual flow of the Deep River prior to construction of the Randleman Dam to be 163 cubic feet per second. We overrule this issue.

VI. Exhaustion of Administrative Remedies

[3] Defendant also maintains as error the trial court’s conclusion of law that plaintiffs had no administrative remedies to exhaust before bringing their inverse condemnation claim against defendant. Defendant contends that plaintiffs were required to contest the issuance of the EMC certificate or the 404 permit before bringing their claim for inverse condemnation. We do not agree.

The EMC certificate and 404 permit authorized defendant to exercise the power of eminent domain by diverting water from the Deep River basin and constructing the Randleman Dam. However, plaintiffs are not challenging defendant’s right to exercise eminent domain or to construct the Randleman Dam, but are asking for compensation from defendant for reduction of water flow in the Deep River.

If the Legislature has created an effective administrative remedy, “that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.” *Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 522, 658 S.E.2d 520, 522 (2008). When a plaintiff has failed to exhaust his administrative remedies, the action shall be dismissed for lack of subject matter jurisdiction. *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 353, 444 S.E.2d 636, 639 (1994).

A property owner’s remedy for the government’s failure to compensate him for the taking of his property is to bring an inverse condemnation action under N.C. Gen. Stat. § 40A-51 (2009). Due to the fact that defendant is a public authority organized under N.C. Gen. Stat. § 162A-3.1, the trial court has subject matter jurisdiction over plain-

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

tiffs' claim pursuant to N.C. Gen. Stat. § 162A-18 (2009), which provides that:

Any riparian owner alleging an injury as a result of any act of an authority created under this Article may maintain an action for relief against the acts of the authority either in the county where the lands of such riparian owner lie or in the county in which the principal office of the authority is maintained.

Defendant's argument that any inverse condemnation claim is defined by the parameters and rights set out in the impoundment statutes and the EMC certificate is misplaced. The EMC Certificate only authorizes defendant the right to exercise eminent domain by diverting the waters and does not concern plaintiffs' right to compensation.

Plaintiffs are not required to intervene in defendant's applications for the EMC certificate or 404 permit because they are not challenging defendant's right to divert water from the Deep River or construct the Randleman Dam, but are asking to be compensated as a result of the reduction of water flow. A lack of subject matter jurisdiction for failure to exhaust administrative remedies "does not apply where the judicial remedy sought is not available under the administrative process." *Hemric v. Groce*, 154 N.C. App. 393, 399-400, 572 S.E.2d 254, 258 (2002). Even if plaintiffs did intervene in the permitting application, there is nothing that grants the Environmental Management Commission or the Department of the Army authority to award compensation as a result of defendant's taking.

The issuance of a permit does not alter the rights of the property owners to seek just compensation. *See Hudson*, 665 F. Supp. at 447 (concluding that if a riparian owner suffers injury by a diversion of the natural water flow the owner should address those rights in civil action for injunctive relief or damages). Plaintiffs are not challenging the EMC certificate or defendants' right to exercise eminent domain, but are asking only to be compensated as a result of the diverted waters. The trial court properly concluded that plaintiffs had no administrative remedies to exhaust before bringing their inverse condemnation claim against defendant.

VII. Method of Valuation

[4] Defendant also maintains the following conclusion of law was error:

The direct impact of [defendant's] taking of Plaintiffs' riparian rights can therefore be valued by the loss of electricity capable of

L&S WATER POWER, INC. v. PIEDMONT TRIAD REG'L WATER AUTH.

[211 N.C. App. 148 (2011)]

being produced by each of the Operational Plants as a result of the reduction of the natural stream flow of the Deep River across Plaintiffs' property.

We reject defendant's argument.

When determining just compensation in a partial taking, the trial court can "admit any relevant evidence that will assist the jury in calculating the fair market value of property and the diminution in value caused by condemnation." *M.M. Fowler*, 361 N.C. at 6, 637 S.E.2d at 890. "Accepted methods of appraisal in determining fair market value include: (1) the comparable sales method, (2) the cost approach, and (3) the capitalization of income approach." *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992).

In *Cloaninger*, we held that the capitalization of income approach was a permissible method to calculate the loss of the actual or projected income from a dairy farm that had been taken. *Id.* at 15, 415 S.E.2d at 114. Defendant's argument that *M.M. Fowler* prohibits a jury's considering evidence of lost business profits in condemnation actions is misplaced. The revenue derived directly from the property taken can be distinguished from the profits of a business located on the property. Contrary to the plaintiff in *M.M. Fowler*, plaintiffs in the present case are not seeking compensation for the value of the real property where their hydroelectric power plants are located, but seek compensation for the value of the property taken. *See id.* at 3-4, 637 S.E.2d at 888.

The amount of electricity that plaintiffs can generate is dependent upon the amount of water flow in the Deep River. The trial court found that the Randleman project has and will continue to significantly reduce the flow of water downstream. Therefore, the capitalization of income approach used by the trial court is a reasonable method to calculate plaintiffs' compensation. We overrule this assignment of error.

VIII. Conclusion

For the above mentioned reasons, we affirm the order of the trial court.

Affirmed.

Judges GEER and STEPHENS concur.

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

JAMES L. McDOWELL, PLAINTIFF v. CENTRAL STATION ORIGINAL INTERIORS, INC.,
DEFENDANT

No. COA10-324

(Filed 19 April 2011)

1. Employer and Employee— Retaliatory Employment Discrimination Act— reason for termination—summary judgment improper

The trial court erred by granting defendant employer's motion for summary judgment in a case alleging termination in violation of the Retaliatory Employment Discrimination Act. There was a genuine issue of material fact as to why plaintiff was terminated after he exercised his right to file a workers' compensation claim.

Appeal by plaintiff from order entered 11 December 2009 by Judge Edgar B. Gregory in Superior Court, Guilford County. Heard in the Court of Appeals 11 October 2010.

Morgan, Herring, Morgan, Green, & Rosenblutt, L.L.P. by Todd J. Combs, for plaintiff-appellant.

Clayton B. Krohn, for defendant-appellee.

STROUD, Judge.

Plaintiff filed a complaint alleging defendant terminated him in violation of the Retaliatory Employment Discrimination Act. The trial court granted defendant's motion for summary judgment, and plaintiff appeals. As we conclude that plaintiff has forecast a genuine issue as to a material fact, we reverse.

I. Background

On 27 February 2009, plaintiff sued defendant alleging in pertinent part:

8. On or about November 5, 2007 Plaintiff was injured at work in a job related hernia injury and received medical care resulting in Plaintiff being out of work as a result of the job related injury through March 1, 2008.
9. After Plaintiff's hernia injury on November 5, 2007, Plaintiff filed a workers' compensation claim due to his health injuries and said claim was reported to the Defendant.

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

10. On or about March 3, 2008 Plaintiff returned to his employment. After March 3, 2008, the Plaintiff returned to work with unrestricted duty.
11. For the approximate fifteen (15) month period the Plaintiff was employed by Defendant, he only missed work during the above stated period of time due to his hernia injury, when the Plaintiff was in that hospital for three (3) day[s] during the summer of 2007 due to a blood disorder and Plaintiff was tardy on only one (1) occasion.
12. When Plaintiff returned to work, Lisa Hyatt, Chief Financial Officer of Defendant, informed Plaintiff that his job had been “cut”, that Plaintiff had been assigned to “clean up duty”, that Plaintiff had been put on probation for ninety (90) days due to Plaintiff’s “sorry” work record, and that Plaintiff had done nothing except “cost the company money” since Plaintiff had been there and that Plaintiff was a “risk to the company”.
13. On or about March 18, 2008 at 5:30 P.M. Plaintiff fell on his back porch steps when he saw a snake and injured his back.
14. On or about March 19, 2008 at 6:30 A.M. Plaintiff contacted his supervisor, Defendant employee Derek Latham that Plaintiff hurt his back and that he had to go see a doctor. Plaintiff’s doctor instructed Plaintiff to have bed rest for the rest of the week and Plaintiff relayed this information to his supervisor Derek Latham.
15. Plaintiff was instructed by Derek Latham that he had to talk to Lisa Hyatt who requested that Plaintiff provide her with a doctor’s note. Plaintiff presented Lisa Hyatt with a doctor[’]s note on the morning of March 19, 2008 and Plaintiff was terminated by Defendant on March 19, 2008. Lisa Hyatt told Plaintiff he was on ninety (90) day probation since [he] had had [sic] returned to work on March 3, 2008 and that now Plaintiff was “out the door” and “fired.”
16. The Defendant’s assertions said [sic] that it was proper to terminate the Plaintiff due to absenteeism, failure to follow safety procedures, and insubordination is a ploy used by the Defendant to terminate the Plaintiff’s employment because of Defendant’s retaliatory discharge for Plaintiff filing a workers’ compensation claim.

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

Plaintiff alleged defendant terminated him contrary to the Retaliatory Employment Discrimination Act (“REDA”). Plaintiff requested, *inter alia*, “his back pay losses, prejudgment interest on back pay losses, front pay losses, job benefits, wage increases and diminished retirement benefits, emotional distress damages, punitive damages, and compensatory damages[,]” and “[t]hat the Defendant be ordered to implement procedures and policies to prevent illegal discriminatory activities and that the Defendant is enjoined from committing further violations of the Retaliatory Employment Discrimination Act[.]”

On or about 20 November 2009, defendant filed an amended motion for summary judgment because “there [was] no genuine issue as to any material fact and that Central Station is entitled to judgment as a matter of law.” On 11 December 2009, the trial court granted summary judgment in favor of defendant and dismissed all of plaintiff’s claims with prejudice. Plaintiff appeals.

II. Summary Judgment

Plaintiff argues that “the trial court committed reversible error by dismissing this action and granting Defendant’s Motion for Summary Judgment.” (Original in all caps.) “Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). “The evidence must be viewed in the light most favorable to the non-moving party.” *Wiley v. United Parcel Service, Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004).

N.C. Gen. Stat. § 95-241(a) provides in pertinent part that

[n]o person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to . . .

[f]ile a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to . . .

Chapter 97 of the General Statutes.

N.C. Gen. Stat. § 95-241(a) (2007).

The statute [which REDA replaced] does not prohibit all discharges of employees who are involved in a workers’ compensa-

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

tion claim, it only prohibits those discharges made because the employee exercises his compensation rights. Furthermore, our appellate courts indicated in applying the former provision that a plaintiff fails to make out a case of retaliatory action where there is no close temporal connection between the filing of the claim and the alleged retaliatory act.

Salter v. E & J Healthcare, Inc., 155 N.C. App. 685, 691, 575 S.E.2d 46, 50 (2003) (citation and quotation marks omitted).

The North Carolina Retaliatory Employment Discrimination Act (REDA) prohibits discrimination or retaliation against an employee for filing a worker's compensation claim. In order to state a claim under REDA, a plaintiff must show (1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a). An adverse action includes the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment. If plaintiff presents a prima facie case of retaliatory discrimination, then the burden shifts to the defendant to show that he would have taken the same unfavorable action in the absence of the protected activity of the employee. Although evidence of retaliation in a case such as this one may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation.

Wiley at 186-87, 594 S.E.2d at 811 (citations and quotation marks omitted).

Here, there is no dispute that plaintiff "exercised his rights" to file a worker's compensation claim and "that he suffered an adverse employment action" as he was terminated from employment. *Id.* at 186, 594 S.E.2d at 811. Thus, the only issue left in considering whether plaintiff properly brought a REDA claim is whether "the alleged retaliatory action was taken because . . . [plaintiff] exercised his rights" to file a worker's compensation claim. *Id.*

Ms. Lisa Hyatt, defendant's Chief Financial Officer, stated in her affidavit that "plaintiff had excessive absences from work, failed to follow company procedures including, but not limited to, driving a

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

forklift without certification, preparing the wrong products for shipment to customers, not following instructions of the manager and engaging in insubordinate behavior.” Ms. Hyatt stated that plaintiff “was terminated for not reporting to work and for excessive absenteeism.”

However, Mr. Mike West, a former employee of defendant who worked as a shipping manager, filed an affidavit stating that plaintiff “was a very good employee and always on time.” Mr. West claimed he only knew of one time when plaintiff was tardy and that even then plaintiff informed him beforehand. Mr. West asserted that plaintiff only missed work “due to an illness or injury” and that Lisa told him that they “need to get rid of James before he gets hurt again.” In Mr. West’s deposition he also stated that he was told “they needed to get rid of [plaintiff] before he cost the company a bunch of money and that [he] needed to start writing him up for whatever [he] could.”

Mr. Derek Latham, also a former employee of defendant and plaintiff’s former supervisor, testified in his deposition that defendant had never been absent without a doctor’s note. Mr. Latham testified that he was present when plaintiff returned from his 5 November 2007 injury (“worker’s compensation injury”) and that Ms. Hyatt put plaintiff on ninety-days probation for plaintiff “not [to] get hurt[.]” Mr. Latham also testified that he believed plaintiff was fired “because he filed a health insurance claim[.]”

During plaintiff’s deposition he stated that when he returned from his worker’s compensation injury, Ms. Hyatt told him he hadn’t “done nothing but cost the company money. Now [he’s] a risk to that company[.]” Thus, defendant has presented evidence that plaintiff was terminated for excessive absences, but plaintiff has presented evidence that he was terminated due to his “health claim[;]” the conflicting evidence creates a question of material fact.

Plaintiff directs our attention to *Tarrant v. Freeway Foods of Greensboro, Inc.*, wherein

a district manager allegedly asked [the] plaintiff if she was going to behave and stated, “You’re not going to fall again, are you?” Similarly, when she was fired, [the] plaintiff was told that her job performance was fine, but she was being terminated because “she cost the company a lot of money.”

163 N.C. App. 504, 511, 593 S.E.2d 808, 813, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004). This Court determined that “[t]hese statements strongly suggest that [the] plaintiff was terminated

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

because she instituted and later settled a workers' compensation claim[,]” and therefore reversed the trial court's dismissal of the plaintiff's REDA claim. *Id.*

Defendant states that *Tarrant* and this case are similar to the extent that employees alleged their employers told them they were costing the employer money but contends that the similarities end there. Defendant claims the “costs” statement made here is distinguishable from *Tarrant* because the statement was not made at the time defendant was being terminated; the basis for the statement was different as it involved plaintiff's absences and mistakes; defendant “never acknowledged” plaintiff “was a good worker[;]” and plaintiff was put on probation rather than terminated upon returning to work from his worker's compensation injury.

While we agree with defendant that there are factual differences between *Tarrant* and the present case, we do find the similar language used by the employers regarding “costs” compelling when considering this case. Here, the alleged “costs” statement was made when defendant returned to work from his worker's compensation injury, on 3 March 2008, but defendant was not terminated until 19 March 2008; accordingly, defendant was terminated from employment within three weeks of the statement being made. The fact that defendant did not terminate plaintiff until three weeks after making the “costs” statement does not resolve the factual issue as to whether plaintiff was terminated in violation of REDA. *See generally Tarrant* at 511, 593 S.E.2d at 813 (“[A] long interval between the filing of a workers' compensation claim and the termination of the employee could reveal that the two events were not causally related. However, such a concern does not arise where the employer openly admits that the firing was retaliatory. We believe that strictly requiring a close temporal connection would allow employers to circumvent the statute. By simply delaying the retaliatory firing for several months, an employer could prevent a REDA claim from ever going forward, even where there is direct evidence of a wrongful motive.”).

Next, while defendant is correct that the “costs” statement could be interpreted as being based upon the cost of plaintiff's absences and mistakes, we must consider the evidence in the light most favorable to plaintiff. *See Wiley* at 186, 594 S.E.2d at 811. In this light, the “costs” statement could easily be interpreted as referring to the cost of plaintiff's worker's compensation claim, particularly as the statement was made on the very day that plaintiff returned to work from his worker's compensation injury.

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

Also, while defendant may have “never acknowledged . . . [plaintiff] was a good worker[,]” defendant does acknowledge that “the issue is not whether the appellant worked hard or was punctual; it is whether the termination was a result of the filing of the workers’ comp claim.” While plaintiff’s work performance is relevant in the analysis of defendant’s motive in terminating plaintiff’s employment, evidence that plaintiff was a “bad” worker does not preclude the possibility that plaintiff’s employment was terminated in violation of REDA. In addition, plaintiff has presented evidence from Mr. West that plaintiff “was a very good employee” and from Mr. Latham that plaintiff was never absent without a doctor’s note.

Lastly, although defendant was put on probation instead of immediately being terminated upon his return to work from his worker’s compensation injury, we again note that “strictly requiring a close temporal connection would allow employers to circumvent the statute. By simply delaying the retaliatory firing for several months, an employer could prevent a REDA claim from ever going forward, even where there is direct evidence of a wrongful motive.” *Tarrant* at 511, 593 S.E.2d at 813. One method of “delaying the retaliatory firing” could be putting an employee on probation. *Id.*

Defendant contends that this case is “on point” with *Salter*. In *Salter*, on 2 June 1999, the plaintiff fell at work and broke her foot. 155 N.C. App. at 687, 575 S.E.2d at 47. The plaintiff alleged that her supervisor was opposed to her seeking worker’s compensation, while plaintiff’s supervisor denied such allegations; however, “it has never been contested that plaintiff has failed to get all the workers’ compensation to which she was entitled.” *Id.* at 687, 575 S.E.2d at 48.

After two and one-half months of light duty, on 16 August 1999, plaintiff reinjured her foot while away from work when she tripped at her home. . . . Plaintiff had a scheduled appointment with her physician on 24 August 1999, and planned to return to work after this appointment.

Prior to August 24th, however, plaintiff was summoned to work to pick up her check and discuss some things with Frances Ivey[, plaintiff’s supervisor]. On 23 August 1999, Ms. Ivey gave plaintiff her check along with a letter that had been faxed to her from defendant’s head office.

Id. at 687-88, 575 S.E.2d at 48. The letter essentially informed plaintiff that her leave due to her injury would be without pay and that she

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

would be allowed to return to work if an appropriate position was available though one was not guaranteed; the letter also provided that a failure to follow the employer's "procedure" would result in "immediate dismissal." *Id.* at 688, 575 S.E.2d at 48. The plaintiff claimed that upon receiving the letter her supervisor informed her she must sign it or be terminated from employment. *Id.* Plaintiff filed suit, and defendant filed a motion for summary judgment which the trial court granted in defendant's favor. *Id.* at 689, 575 S.E.2d at 49. Plaintiff appealed because "the trial court erred in granting summary judgment to defendant because genuine issues of material fact existed as to whether defendant took retaliatory action against her because she filed a workers' compensation claim, in violation of REDA, N.C. Gen. Stat. § 95-240, *et. seq.* (2001)." *Id.* at 690, 575 S.E.2d at 49-50. This Court determined that

[s]everal things are wrong with plaintiff's claim. First, there is no close temporal connection between plaintiff's instituting a workers' compensation claim and her termination. Second, plaintiff offers little more than mere speculation that defendant gave her the letter because she filed a workers' compensation claim. Nothing in the letter refers to workers' compensation. Plaintiff was allowed to return to work after filing her workers' compensation claim. Defendant filed all necessary papers for plaintiff to receive benefits, and plaintiff indeed received them. It was not until the second injury occurred and plaintiff was out of work for a full week following a sustained period of light duty was she offered the letter. To recover, plaintiff must show that her discharge was caused by her good faith institution of the workers' compensation proceedings. This she fails to do. Despite plaintiff's assertions that one of defendant's employees was less than cordial, her allegations do not raise a triable, material issue of fact. Thus, summary judgment on plaintiff's REDA claim is affirmed.

Id. at 691-92, 575 S.E.2d at 50-51 (2003) (citation, quotation marks, and ellipses omitted).

Here, we do not believe *Salter* is "on point" with the present case. In *Salter*, the plaintiff returned to work from her worker's compensation injury and worked for two and one-half months. *Id.* at 687, 575 S.E.2d at 48. It was only after the *Salter* plaintiff's second non-worker's compensation injury that she received the letter. *Id.* at 687-88, 575 S.E.2d at 48. Here, however, plaintiff was allegedly told he had "done nothing except 'cost the company money' " upon his return

McDOWELL v. CENT. STATION ORIGINAL INTERIORS, INC.

[211 N.C. App. 159 (2011)]

to work from his worker's compensation injury. In other words, in *Salter*, it appears that the plaintiff simply returned to work after her worker's compensation injury and proceeded to work for two and one-half months before she received the letter, *see id.*, but here, plaintiff was told he "cost the company money" and placed on probation the very day he returned to work from his worker's compensation injury.

Finally, defendant spends a large portion of its brief addressing various statements by Mr. West, Mr. Latham, and plaintiff and how these statements are "speculation[.]" While defendant is correct in noting that more than speculation is required to create a genuine issue of material fact, *Wiley* at 187, 594 S.E.2d at 811, we do not believe that the testimonies of Mr. West, Mr. Latham, and plaintiff can be completely characterized as such. Mr. West testified that Ms. Hyatt told him that they "need to get rid of James before he gets hurt again[;]" Mr. Latham testified that Ms. Hyatt put plaintiff on ninety-days probation for plaintiff "not [to] get hurt[;]" and during plaintiff's deposition he stated that when he returned from his worker's compensation injury, Ms. Hyatt told him he hadn't "done nothing but cost the company money. Now [he's] a risk to that company[.]" Accordingly, we conclude that there was a genuine issue of material fact as to why plaintiff was terminated from employment, and thus the trial court erred in granting summary judgment in favor of defendant.

III. Conclusion

For the foregoing reasons, we reverse the trial court order granting summary judgment in favor of defendant.

REVERSED.

Chief Judge MARTIN and Judge STEPHENS concur.

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

UNITED STATES TRUST COMPANY, N.A., PLAINTIFF v. JOHN R. RICH, D. KENNETH DIMOCK, GLENDA R. BURKETT, ANTHONY P. MONFORTON, MARTHA JO BROOKS, WILLIAM W. WATSON, VIRGINIA B. SASLOW, SANDRA G. BOES, SUZANNE C. WILCOX, KIM M. VAN ZEE, AND KIMBERLY LEMONS, DEFENDANTS

No. COA10-253

(Filed 19 April 2011)

1. Arbitration and Mediation— motion for rehearing denied—trial court familiarity

The trial court did not abuse its discretion by denying defendants' motion for rehearing concerning the issue of arbitration upon remand from the Court of Appeals in light of the trial court's familiarity with the case.

2. Arbitration and Mediation— motion to stay litigation— motion to compel arbitration—associated person

The trial court did not err by denying defendants' motion to stay litigation and compel arbitration. Plaintiff did not qualify as an "associated person" under Financial Industry Regulatory Authority (FINRA) code of Arbitration Procedure for Industry Disputes or FINRA Bylaws, and plaintiff was not a third-party beneficiary of defendants' Form U-4s.

Appeal by defendants from orders entered 2 November 2009 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 October 2010.

McGuireWoods, LLP, by Irving M. Brenner, John G. McDonald, Makila Sands Scruggs, and Monica E. Webb, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for defendants-appellants.

STEELMAN, Judge.

The trial court did not abuse its discretion in denying defendants' motion for re-hearing upon remand from the Court of Appeals. Where plaintiff does not qualify as an "associated person" under FINRA code of Arbitration Procedure for Industry Disputes or FINRA By-Laws and plaintiff was not a third-party beneficiary of defendants' Form U-4s, the trial court did not err in denying defendants' motion to stay litigation and compel arbitration.

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

I. Factual and Procedural History

United States Trust Company, N.A. (“plaintiff”) is a wealth management services company. Plaintiff’s Greensboro, North Carolina office primarily offered wealth management services to individual clients and investment management services to institutional clients. Plaintiff was alleged to have required its employees John R. Rich (“Rich”), D. Kenneth Dimock (“Dimock”), Glenda R. Burkett (“Burkett”), Anthony P. Monforton (“Monforton”), Virginia B. Saslow (“Saslow”), Martha Jo Brooks (“Brooks”), William W. Watson (“Watson”), and Suzanne C. Wilcox (“Wilcox”) to register with the National Association of Securities Dealers, Inc., now called the Financial Industry Regulatory Authority (“NASD/FINRA”). In order to register with NASD/FINRA, each of the individuals listed above had to complete a Uniform Application for Securities Industry Registration or Transfer Form (“Form U-4”) listing UST Securities, a subsidiary of plaintiff, as their member firm. Each of these Form U-4s contained an arbitration clause that read as follows:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the [Self Regulatory Organization] as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*.

(emphasis in original). The only individual defendant employees who did not complete the Form U-4 were Sandra G. Boes (“Boes”), Kim M. Van Zee (“Van Zee”), and Kimberly Lemons (“Lemons”).

In November of 2006, Bank of America announced that it would acquire plaintiff effective 1 July 2007. On 29 June 2007, defendants Saslow, Brooks, and Dimock resigned from plaintiff. On 2 July 2007 defendants Rich, Burkett, Monforton, Watson, Wilcox, Boes, Van Zee, and Lemons also resigned. Each of these defendants began employment with defendant, Stanford Group, presumably to perform duties similar to those they had performed for plaintiff. On 18 July 2007, plaintiff filed a complaint against Stanford Group, Saslow, Brooks, Dimock, Rich, Burkett, Monforton, Watson, Boes, Wilcox, Van Zee, and Lemons (“collectively defendants”) alleging breach of contract, breach of duty of loyalty, conversion, tortious interference with contractual relations, unfair trade practices, civil conspiracy, and misappropriation of trade secrets and confidential information, N.C. Gen.

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

Stat. § 66-154 *et. seq.* The complaint also sought a temporary restraining order and preliminary injunction against defendants. On 3 August 2007, Judge Albert Diaz entered an order denying plaintiff's motion for a temporary restraining order. Defendants filed a motion to dismiss or in the alternative to stay proceedings and compel arbitration on 30 August 2007. This motion was denied by Judge Richard D. Boner on 20 September 2007, and defendants gave notice of appeal to this Court on 2 October 2007. Plaintiff voluntarily dismissed Stanford Group as a defendant on 21 November 2007. *U.S. Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513, n.1 (2009).

The order denying the motion to dismiss or to compel arbitration was not stayed. On 4 January 2008, [plaintiff] filed a motion for a preliminary injunction enforcing employment agreements allegedly entered into by defendants Rich, Burkett, Dimock, Monforton, Brooks, Watson, Wilcox, and Saslow. [Plaintiff] did not seek relief as to defendants Boes, Van Zee, and Lemons and ultimately withdrew its request for relief as to defendant Wilcox. On 28 January 2008, the trial court entered an order denying [plaintiff's] preliminary injunction motion as to defendants Dimock and Rich, but granting it in part as to Burkett, Monforton, Brooks, Watson, and Saslow. [Plaintiff] and the five defendants subject to the injunction filed a separate appeal from that order, COA08-472, which is the subject of a separate opinion.

Id., 199 N.C. App. at 289, 681 S.E.2d at 513.

On appeal from Judge Boner's denial of defendants' motion to dismiss or in the alternative compel arbitration, this Court remanded to the trial court "to make adequate findings of fact as to whether a valid arbitration agreement existed between the parties." *Id.* at 288, 681 S.E.2d at 512-13. On 27 October 2009, defendants filed a motion for re-hearing on remand. Judge Boner entered an order denying defendants' motion for re-hearing on 2 November 2009. On that same day Judge Boner entered an order denying defendants' motion to dismiss or in the alternative to stay litigation and compel arbitration. On 2 December 2009, defendants gave notice of appeal from the two orders entered on 2 November 2009.

II. Motion for Re-Hearing

[1] In defendants' first argument, they contend that the trial court erred by refusing to consider additional evidence and argument concerning the issue of arbitration upon remand from the Court of Appeals. We disagree.

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

A. Standard of Review

We review the trial court's denial of defendants' motion for re-hearing on remand for an abuse of discretion. *See Steffes v. DeLapp*, 177 N.C. App. 802, 805, 629 S.E.2d 892, 895 (2006); *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006) ("On remand, the trial court may hear evidence and further argument to the extent it determines in its discretion that either or both may be necessary and appropriate."). "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002) (citation omitted).

B. Analysis

We hold Judge Boner did not abuse his discretion in denying defendants' motion for re-hearing. At the time of Judge Boner's denial of defendants' motion for re-hearing on 2 November 2009, Judge Boner had been involved in the instant case for over two years, having first entered an order in the case denying defendants' motion to dismiss or in the alternative to stay proceedings and compel arbitration on 20 September 2007. The Burkett affidavit that defendants requested Judge Boner review during re-hearing was filed in the instant case on 11 January 2008. Judge Boner entered a preliminary injunction order in the case on 28 January 2008. In light of Judge Boner's familiarity with the case, his decision not to hold a re-hearing was not a decision "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark*, 151 N.C. App. at 566, 566 S.E.2d at 161.

This argument is without merit.

III. Motion to Stay Litigation and Compel Arbitration

[2] In defendants' second argument, they contend the trial court erred in denying their motion to stay litigation and compel arbitration. We disagree.

A. Standard of Review

The question of whether a dispute is subject to arbitration is an issue for judicial determination. This determination involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

(2) whether the specific dispute falls within the substantive scope of that agreement.

. . . .

The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal.

Slaughter v. Swicegood, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citations and quotations omitted).

B. Findings of Fact

Defendants contend findings of fact thirteen, fifteen, and seventeen are not supported by the evidence. We disagree.

The challenged findings of fact are as follows:

13. There is no evidence that the [defendants] sold securities on behalf of UST Securities.
15. There is no evidence that UST Securities ever employed any of the Defendants.
17. There is no evidence that [plaintiff] reaped any more than a *de minimums* [sic] benefit from the relationship between the [defendants] and UST Securities.

We hold these findings are supported by competent evidence. The affidavit of Charlene Barrett, Vice President of Human Resources for plaintiff, states that "[t]he Individual Defendants were employed by [plaintiff]," and "were not employed by UST Securities Corp. and never received any compensation from UST Securities Corp." The affidavit of Scott Barber, the Chief Compliance Officer for UST Securities Corp., states that "[t]he Individual Defendants were not authorized to hold themselves out as registered representatives of UST Securities Corp., or use the name of [UST Securities Corp.] on their business cards." These affidavits support the findings of fact above. While defendants' affidavits made contradictory assertions, we reiterate that "[t]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

supported findings to the contrary.” *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580 (quotation omitted).

C. “Associated Person”

Defendants argue that plaintiff qualifies as an “associated person” under NASD/FINRA Rules, and is therefore required to arbitrate under the provisions of Form U-4. We disagree.

Section 13200(a), entitled Required Arbitration, of the FINRA Code of Arbitration Procedure for Industry Disputes provides:

Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:

- Members;
- Members and Associated Persons; or
- Associated Persons.

It is undisputed that plaintiff was not a “member” under NASD/FINRA Rules, and we hold that plaintiff does not qualify as an “associated person” under those Rules. Article I, section (rr) of the FINRA By-Laws defines “person associated with a member” or “associated person of a member” as:

(1) a natural person who is registered or has applied for registration under the Rules of the Corporation; (2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member.

The definition of “associated person” in Section 13100(a) and (r) of the FINRA Code of Arbitration Procedure for Industry Disputes is nearly identical to the definition contained in the FINRA By-Laws. The only differences between the two definitions are that FINRA is substituted for Corporation in the definitions contained in the Code of Arbitration Procedure and the Code of Arbitration Procedure does

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

not contain subsection (3). A 1999 notice of NASD By-Law Amendment clarified that “associated person” describes only natural persons. 99-95 NASD ANNOUNCES CHANGES TO THE BY-LAWS ASSOCIATED PERSON DEFINITION (1999) (“[T]he amendments insert the word ‘other’ into subsection 2 of the definition of ‘person associated with a member’ to clarify that the subsection describes only natural persons.”).

We hold that the term “associated person” refers only to natural persons. We recognize that this holding is contrary to the holding of this Court in *LSB Financial Services, Inc. v. Harrison*, 144 N.C. App. 542, 548 S.E.2d 574 (2001); however, the Form U-4 at issue in that case was executed prior to the 1999 NASD By-Law Amendment to the definition of “associated person” making clear that “associated persons” had to be natural persons. Therefore, *LBS* is distinguishable from the instant case and is not controlling. Plaintiff is not an “associated person” as defined by FINRA By-Laws and Code of Arbitration Procedure, and therefore is not required to arbitrate the instant dispute.

D. Third-Party Beneficiary

Defendants’ further argue that plaintiff is a third-party beneficiary of the contracts (Form U-4s) executed by NASD/FINRA and defendants listing UST Securities as defendants’ member firm. We disagree.

This Court has held that in order to establish a claim as a third-party beneficiary, plaintiff must show:

(1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]. A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly. In determining the intent of the contracting parties, the court should consider [the] circumstances surrounding the transaction as well as the actual language of the contract.

Revels v. Miss Am. Org., 182 N.C. App. 334, 336, 641 S.E.2d 721, 723 (2007) (quotations omitted, alterations in original), *disc. review denied*, 361 N.C. 430, 648 S.E.2d 844 (2007).

Defendants only challenged findings of fact thirteen, fifteen, and seventeen. We have held that these findings are supported by compe-

U.S. TRUST CO., N.A. v. RICH

[211 N.C. App. 168 (2011)]

tent evidence, and that these findings in combination with other unchallenged findings support the trial court's conclusion that plaintiff is not a third-party beneficiary of defendants' Form U-4s.

The trial court made the following findings of fact:

8. In order to apply for licensure [with NASD/FINRA], the [defendants] were required to complete a Form U-4 and file it with the NASD/FINRA. The Form U-4 contains an arbitration clause that states in part: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules[.]" The Form U-4 requires that the applicant identify his or her firm's name.
9. The Form U-4 is an agreement between the person seeking licensure and the NASD/FINRA.

....

14. The [defendants] did not receive compensation from UST Securities.

....

16. [Plaintiff] did not employ the Defendants as securities brokers.

These findings of fact together with findings of fact thirteen, fifteen, and seventeen make clear that defendants and NASD/FINRA did not intend the Form U-4s they executed to benefit plaintiff directly. *Revels*, 182 N.C. App. at 336, 641 S.E.2d at 723. The language of the Form U-4 contract only requires that disputes between the defendants and their firms be arbitrated or between defendants and others as required by NASD/FINRA Rules. It is undisputed that plaintiff is not defendants' member firm. Further as discussed above in the section addressing "associated persons," we held that plaintiff is not an "associated person" under the NASD/FINRA Rules with whom defendants are required to arbitrate. The actual language of the Form U-4 and related NASD/FINRA Rules do not demonstrate any intent on the part of the contracting parties to directly benefit plaintiff. *Id.*

"[T]he circumstances surrounding the transaction" also reveal the lack of intent of the contracting parties to directly benefit plaintiff. *Id.* As found by the trial court, there is no evidence that the defendants were employed in any way by UST Securities or that plaintiff received any more than a *de minimus* benefit from the rela-

EDGECOMBE CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

tionship created by the Form U-4 between defendants and UST Securities. For these reasons we hold that the trial court properly determined that plaintiff was not a third-party beneficiary of defendants' Form U-4s, and that plaintiff was therefore not required to arbitrate its dispute with defendants.

Defendants also argue in footnote six of their brief that "[t]he doctrine of equitable estoppel likewise prevents Plaintiff from eschewing Form U-4's arbitration provision while, at the same time, directly benefitting from the Registrants' mandatory licensure with NASD/FINRA." As discussed above, plaintiff did not directly benefit from defendants' registration with NASD/FINRA; therefore, this argument is without merit.

AFFIRMED.

Judges BRYANT and ERVIN concur.

EDGECOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER V.
CLIFTON B. HICKMAN AND EMPLOYMENT SECURITY COMMISSION OF NORTH
CAROLINA, RESPONDENTS

No. COA10-473

(Filed 19 April 2011)

**Administrative Law— standard of review—unemployment
insurance benefits**

The superior court applied an improper standard of review when reversing the Employment Security Commission's (ESC) decision to disqualify claimant from unemployment insurance benefits. The order setting aside the ESC's decision was vacated and remanded to the superior court for review utilizing the correct standard of review.

Appeal by respondent Employment Security Commission of North Carolina from order entered on or about 12 January 2010 by Judge Walter H. Godwin, Jr. in Superior Court, Edgecombe County. Heard in the Court of Appeals 26 October 2010.

EDGECOMBE CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

Taylor, Brinson & DeLoatch, by Mahlon W. DeLoatch, Jr. and J. Chad Hinton, for petitioner-appellee.

Camilla F. McClain, for respondent-appellant Employment Security Commission of North Carolina.

STROUD, Judge.

The superior court concluded that claimant Mr. Clifton B. Hickman was “disqualified to receive unemployment insurance benefits” and reversed a decision of the Employment Security Commission of North Carolina (“ESC”). The ESC appealed. For the following reasons, we vacate and remand the order of the superior court for application of the correct standard of review.

I. Background

On or about 16 June 2009, an Appeals Referee with the ESC heard the claim of Mr. Hickman. The Appeals Referee found:

1. Claimant last worked for Edgecombe County on December 31, 2008 as Assistant Director for Social Services. From February 1, 2009 until March 28, 2009, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a)

2. The Adjudicator issued a conclusion under Docket No. 28241 holding claimant disqualified for benefits beginning February 1, 2009, G.S. 96-14(1) and not eligible for benefits from February 1, 2009 through February 14, 2009, G.S. 96-15(c)[sic]. Claimant appealed. Pursuant to G.S. 96-15(c), this matter came on before Appeals Referee L.M. Emma for hearing on June 16, 2009. Present for the hearing: Claimant; **the employer was not present and no request for a continuance was made.**

3. Claimant left the job because his work environment was substantially and adversely modified, without justification, and without explanation.

4. Claimant had been employed by this employer for approximately 27 years. Claimant had been working as Assistant Director for Social Services at the time of his separation. Claimant’s supervisor was Marva Scott.

EDGECOMBE CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

5. In or about August 2008, claimant was suspended by his supervisor for thirty days with pay because of a complaint. Claimant was subsequently told that the claim[] was unjustified.

6. Thereafter, Scott removed two or three mid-level staff from claimant's supervision. Claimant's job duties and responsibilities were greatly reduced. Scott refused to allow claimant to attend conferences and workshops. Claimant was being required to bring doctor's notes for any day absent contrary to employer policy requiring a doctor's note if absent for three or more days for illness.

7. Claimant had received no prior warnings or reprimands and had not been told that his job was in jeopardy. All of claimant's evaluations were satisfactory.

8. Scott offered claimant no explanation for the changes to his position, the refusal to allow him to attend conferences and workshops, or the requirement that he bring in a doctor's note for any absence contrary to the employer's policy. When claimant asked why the changes were being made, Scott would only tell him that she had the authority to make the changes. Claimant complained to the employer's Board of Directors and was referred back to Scott.

(Emphasis added.) The Appeals Referee determined, *inter alia*, that "[c]laimant is not disqualified for unemployment benefits." Employer Edgecombe County Department of Social Services ("DSS") appealed the Appeals Referee's decision, and on or about 30 July 2009, the ESC through its Chairman issued a decision which provided that

the Commission concludes that the facts found by the Appeals Referee were based on competent evidence and adopts them as its own. The Commission also concludes that the Appeals Referee properly and correctly applied the Employment Security Law (G.S. § 96-1 et seq.) to the facts as found, and the resultant decision was in accordance with the law and fact[s].

The ESC affirmed the decision of the Appeals Referee.

On 28 August 2009, DSS "appeal[ed] and petition[ed] for judicial review[.]" DSS's petition stated that "Defendant/Employer does not agree with the decision of the Commission that Plaintiff/Claimant is not disqualified to receive unemployment insurance benefits[.]" As to the reasons for Mr. Hickman's disqualification to receive unemployment insurance benefits, DSS's petition alleged numerous facts which were not argued at the 16 June 2009 hearing, as DSS was not present

EDGECOMBE CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

or represented at the hearing.¹ DSS's petition does not include any exceptions to any of the ESC's findings of fact or the hearing procedure. On or about 12 January 2010, the superior court reversed the decision of the ESC concluding that Mr. "Hickman is disqualified to receive unemployment insurance benefits." The superior court's order did not state any reason for its reversal of the decision of the ESC. The ESC appeals.

II. Superior Court's Standard of Review

The ESC first contends that the superior court applied the incorrect standard of review in reversing the ESC's decision. We agree.

North Carolina General Statute 96-15(i) governs the applicable standard of review in appeals of this type. The statute provides in relevant part that "[i]n any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C. Gen. Stat. § 96-15(i) (2005). Thus, findings of fact in an appeal from a decision of the Employment Security Commission are conclusive on both the superior court and this Court if supported by any competent evidence.

James v. Lemmons, 177 N.C. App. 509, 513, 629 S.E.2d 324, 328 (2006).

Under N.C.G.S. § 96-15(h), a claimant's petition for superior court review of an ESC decision shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks. Superior Court jurisdiction is limited to exceptions and issues set out in the petition.

Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 614, 613 S.E.2d 350, 353 (quotation marks omitted), *disc. review denied*, 359 N.C. 853, 619 S.E.2d 511 (2005). "If the findings of fact made by the ESC are supported by competent evidence then they are conclusive on appeal. However, even if the findings of fact are not supported by the evidence, they are presumed to be correct if the petitioner fails to except." *Fair v. St. Joseph's Hosp., Inc.*, 113 N.C. App. 159, 161, 437 S.E.2d 875, 876 (1993), *disc. review denied*, 336 N.C. 315, 445 S.E.2d 394 (1994).

1. DSS states in its petition that "[f]ollowing Plaintiff/Claimant's initial application for unemployment insurance benefits, the Commission held that Plaintiff/Claimant was disqualified to receive benefits. That decision was appealed by the Plaintiff/Claimant; at the appeal hearing, Defendant/Employer did not appear as Defendant/Employer thought the Commission's initial decision that Plaintiff/Claimant was disqualified to receive unemployment insurance benefits was correct and would not be reversed."

EDGEcombe CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

DSS argues that it made appropriate exceptions to the ESC's findings of fact so that it has "preserve[d] its rights on appeal and . . . sustain[ed] the Superior Court's review of the Commission's findings of fact and conclusions of law in the case at bar." DSS notes the

letter of appeal from Director Marva Scott, specifically stated the reason for its initial appeal to the Commission: "based on [claimant's] service retirement" (R p 13). To require more specific pleadings would place an insurmountable burden on employers who may not have the resources to hire legal counsel or the experience to know when counsel is needed. Employer in the instant case feels the Adjudicator's determination was correct and that the record speaks for itself (R p 5-6).

We are unable to discern how a statement that the appeal was "based on [claimant's] service retirement" can be construed as comporting with the requirement that an appellant from an ESC decision "explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks." *Reeves* at 614, 613 S.E.2d at 353 (quotation marks omitted). Here, DSS failed to except to any specific findings of fact as made and adopted by the ESC; therefore, the Appeals Referee's findings "are presumed to be correct[.]" *Fair* at 161, 437 S.E.2d at 876.

Although the superior court did not state what standard of review it was applying, it clearly did not review the ESC order in the proper appellate capacity. *See In re Enoch*, 36 N.C. App. 255, 256, 243 S.E.2d 388, 389 (1978) ("The legislature, in granting this jurisdiction to the superior court, intended for the superior court to function as an appellate court."). The superior court failed to recognize that it was bound by the findings of fact as stated by the Appeals Referee and proceeded to reverse the decision of the ESC without any explanation.

The ESC order addressed the issue of whether Mr. Hickman "left work without good cause attributable to the employer." The only question which the superior court could properly consider was whether the ESC's findings of fact supported its conclusion of law. *James* at 513, 629 S.E.2d at 328. N.C. Gen. Stat. § 96-14 provides, in pertinent part, that:

An Individual shall be disqualified for benefits:

- (1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such

EDGECOMBE CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

individual is, at the time such claimis filed, unemployed because he left work without good cause attributable to the employer.

....

- (1a) Where an individual leaves work, the burden of showing good cause attributable to the employer rests on said individual, and the burden shall not be shifted to the employer.

N.C. Gen. Stat. § 96-14(1)-(1a) (2007).

DSS seeks to argue that Mr. Hickman was disqualified for benefits because he left his job to retire. DSS points out that Mr. Hickman mentioned his retirement in his testimony, so the fact that he retired was in evidence.² This is correct, but the additional information and arguments which DSS attempts to add to the mere statement about retirement go far beyond what is in the record. A party cannot raise an issue for the first time before the superior court in its appellate capacity. *Evans v. Fran-Char Corp.*, 45 N.C. App. 94, 96, 262 S.E.2d 381, 383 (1980). DSS did not raise the issue of Mr. Hickman's retirement before the ESC because it did not attend the hearing. In addition, the superior court cannot consider evidence from outside the record brought before it on appeal[.]" *Enoch* at 257, 243 S.E.2d 390, so DSS would have been unable to present any additional evidence regarding Mr. Hickman's retirement before the superior court.³ Thus, the only argument DSS could have properly raised on its appeal to the superior court is that the ESC's findings of fact did not support its conclusion that Mr. Hickman left his employment with good cause attributable to the employer.

In its brief, DSS "recognizes and admits its error in failing to attend the hearing before the appeals referee." We appreciate DSS's candor in this admission. But DSS then attempts to argue that "the Findings of Fact and evidence of record are sufficient for this Court to reach the same conclusion as the initial Adjudicator and the

2. In fact, one of the exhibits before the Appeals Referee noted that the specific reason Mr. Hickman gave DSS for leaving was "[r]etirement[.]" although he contended that he actually left because of DSS's actions.

3. Our record does not include a transcript of the superior court hearing, and the record does not include any evidence allegedly presented at that hearing. However, the order states that "After hearing evidence presented by Petitioner and Respondents and after reviewing Briefs filed by both parties, the Court concludes that Clifton B. Hickman is disqualified to receive unemployment insurance benefits." (Emphasis added.) We therefore assume that the "evidence" mentioned by the order was limited to the transcript of the hearing and exhibits before the Appeals Referee.

EDGECOMBE CNTY. DEP'T OF SOC. SERVS. v. HICKMAN

[211 N.C. App. 176 (2011)]

Superior Court, that claimant is disqualified to receive unemployment benefits because he left employment without good cause attributable to the employer.” DSS’s arguments are factual arguments which urge this Court, as it urged the superior court, to draw different inferences from the evidence than those drawn by the Appeals Referee, despite DSS’s failure to except to any specific findings of fact. Neither we nor the superior court have the authority to reconsider the findings of fact as DSS requests. *See generally Emp. Sec. Comm. v. Young Men’s Shop*, 32 N.C. App. 23, 29, 231 S.E.2d 157, 160 (“[O]ur Supreme Court has held that in appeals from the Industrial Commission the reviewing court may determine upon proper exceptions whether the facts found by the Commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself.”), *disc. review denied*, 292 N.C. 264, 233 S.E.2d 396 (1977).

The superior court’s order fails to demonstrate that it considered whether the uncontested findings of fact supported the legal conclusion of the ESC, as the ESC’s legal conclusion is obviously correct based upon the binding findings of fact. The uncontested findings of fact cannot support a contrary conclusion. Accordingly, the trial court erred by failing to apply the proper standard of review and thereby reaching a result which is not supported by the record.

III. Conclusion

As the trial court failed to apply the correct standard of review we vacate the order and remand for entry of an order consistent with this opinion, applying the correct standard of review. *See Graves v. Culp, Inc.*, 166 N.C. App. 748, 751, 603 S.E.2d 829, 831 (2004) (“[C]laimant made no exceptions to the ESC’s findings in his petition for review nor did he allege any fraud or procedural irregularity. Therefore, claimant did not preserve those issues for review by the superior court and the court lacked jurisdiction to address them. Its order setting aside the ESC’s decision must be vacated and this cause remanded to the superior court for review utilizing the correct standard of review.”). As we are vacating and remanding the superior court’s order, we need not address the ESC’s other contentions.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

MARK MONROE CHEEK, PLAINTIFF v. SANDRA GREGORY CHEEK, DEFENDANT

No. COA10-736

(Filed 19 April 2011)

1. Divorce— equitable distribution—retirement accounts—diminution in value—insufficient findings on active or passive forces

The trial court erred in an equitable distribution case by its distribution of the parties' retirement accounts. The case was remanded for entry of findings of fact as to whether the decreases in property were due to the actions of defendant wife or passive forces, and for any adjustments of the award consistent with those findings.

2. Divorce— equitable distribution—retirement accounts—tax—consequences

The trial court did not abuse its discretion in an equitable distribution case by failing to award an in-kind distribution of the marital and divisible property for plaintiff's retirement accounts. The trial court was not required to consider tax consequences when no such evidence was placed before it.

3. Divorce— equitable distribution—classification—marital property—insurance check to repair roof—bank account

The trial court did not err in an equitable distribution case by failing to classify and distribute as marital property a check for \$2,288.26 from an insurance company to repair the roof of the marital home. The money was part of the value assigned to the house and land. However, the case was remanded for findings related to plaintiff's Piedmont Aviation Credit Union account and for amending the equitable distribution order if necessary solely on the basis of those findings.

Appeal by defendant from order entered 18 December 2009 by Judge Jeanie R. Houston in Yadkin County District Court. Heard in the Court of Appeals 1 December 2010.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, for plaintiff.

Tharrington Smith, LLP, by Roger W. Smith, Sr., Jill Schnabel Jackson, and H. Suzanne Buckley, for defendant.

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

ELMORE, Judge.

Mark Monroe Cheek (plaintiff) and Sandra Gregory Cheek (defendant) were granted a divorce judgment on 27 June 2007. An equitable distribution order¹ was entered on 18 December 2009 providing for an equal distribution of marital and divisible property. That order included a number of assets, including the marital home, vehicles, and bank and retirement accounts.

I.

[1] Defendant's first argument focuses primarily on the distribution of the parties' retirement accounts. Each party owned three retirement accounts as of the date of separation; two of those belonging to defendant diminished substantially in value during the separation period. Defendant argues that the trial court erred by not considering that diminution in value as divisible property. Specifically, defendant argues that the change in value of the property in question was a result of external, market forces, rather than any action taken by herself, and thus the diminution should be split between the parties. We disagree.

The relevant statute defines "divisible property" in part as:

All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)a (2009). "Under the plain language of the statute, all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008).

This Court recently examined the distinction between active and passive changes in value in this context: " '[P]assive appreciation' refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances

1. The document is actually titled "Equitable Distribution Judgment/Order," but, as our statutes term it an "equitable distribution order," we refer to it as such herein. *See, e.g.*, N.C. Gen. Stat. § 50-21(a) (2009).

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

beyond the control of either spouse. “‘Active appreciation,’ on the other hand, refers to financial or managerial contributions of one of the spouses.” *Brackney v. Brackney*, — N.C. App. —, —, 682 S.E.2d 401, 408 (2009) (citations and quotations omitted; alteration in original).

As noted, defendant’s argument on this point concerns two of defendant’s retirement accounts: (1) an individual retirement account with Fidelity, which had a balance of \$3,182.00 on 17 May 2006, the date of separation, and (2) a 401(k) account from Sprint, also administered by Fidelity, which had a balance of \$128,191.26 on the date of separation. This latter account was a company stock purchase plan that enabled defendant to purchase Sprint stock at a price lower than the publicly available price.

On 24 January 2008, defendant transferred the assets from both accounts into an IRA rollover account with Merrill Lynch. All told, the new account received \$15,148.51 in cash and 5921 shares of Sprint stock, valued at approximately \$10.53 per share, for a total value of \$77,496.51 in the new account. Defendant purchased a Blackrock Mutual Fund with the cash portion. She testified that she made the decision to move the assets herself “because [the account] needed to be diversified, because the Sprint stock had fell [sic] so much.”

In sum, between the date of separation, 17 May 2006, and the date of the equitable distribution order, 18 December 2009, the accounts diminished in value from a total of \$131,373.26 to \$37,199.03. However, on the worksheet attached to its order, the trial court listed the value of defendant’s 401(k) as \$128,191.26 and the value of defendant’s other IRA as \$3,182.00—that is, the accounts’ values as of the date of separation.

Defendant argues that the difference in value should have been classified as divisible property because it was due to the kinds of market forces this Court has classified as “passive” depreciation, in this case, rather than being attributable to the actions of one party. While we agree that change in the actual value of the stocks was out of defendant’s hands, we cannot cast in the same light defendant’s selling the stocks, moving the money to a different account with a different firm, and purchasing/trading with the resulting funds. Such actions are precisely the type of “managerial contributions” described by *Brackney* and, as such, the trial court did not err in not classifying the change in value as divisible property.

However, we cannot endorse the trial court’s failure to make findings of fact regarding the nature of this property. In order to make the most accurate distribution of assets, the trial court should have made

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

findings of fact as to whether the decrease in property was due to the actions of defendant or passive forces. As noted above, the presumption is that such diminution is divisible “*unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse.” *Wirth*, 193 N.C. App. at 661, 668 S.E.2d at 607. If the trial court is unable to attribute a portion of the decrease to the active efforts of defendant, then the presumption is that the entire loss is divisible and such loss should be apportioned evenly between the parties. *Id.*

As such, we remand this case for entry of findings of fact on these points, and any adjustment of the award consistent with those findings.

II.

[2] Defendant next argues that the trial court erred in its failure to award an in-kind distribution of the marital and divisible property—specifically, plaintiff’s retirement accounts. She also argues that the trial court erred by not taking into account the fact that, if she liquidates the portion of the securities fund being distributed to her, she will incur tax and other penalties. These arguments are without merit.

Two sections of N.C. Gen. Stat. § 50-20 are implicated by this argument:

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection: . . . (11) The tax consequences to each party[.]

* * *

(e) *Subject to the presumption of subsection (c) of this section that an equal division is equitable*, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property.

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

N.C. Gen. Stat. § 50-20(c), (e) (2009) (emphasis supplied).

Defendant first argues that the presumption of subsection (e)—that an in-kind distribution is the equitable solution in such a proceeding—was not rebutted by plaintiff, and therefore the trial court should have made such a distribution. However, defendant’s argument ignores the emphasized opening phrase of that subsection, which notes that this presumption is subject to that in subsection (c). It also ignores the fact that our “review of an equitable distribution award ‘is limited to a determination of whether there was a clear abuse of discretion[.]’ ” *White v. Davis*, 163 N.C. App. 21, 28, 592 S.E.2d 265, 270 (2004) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

In support of her argument regarding in-kind distribution, defendant cites two cases: *Shaw v. Shaw*, 117 N.C. App. 552, 451 S.E.2d 648 (1995), and *Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003). In both, this Court remanded because the trial court failed to make findings of fact as to how the defendants could pay the ordered amount.

In *Shaw*, there was evidence before the trial court that the sole source from which the defendant could draw to pay the ordered amount was his retirement fund; this Court noted that “[t]here was no evidence before the trial court that the defendant had liquid assets totaling” the ordered amount and held:

It appears, therefore, that the defendant would have to withdraw money from the thrift plan in order to make the distributive award. The defendant had placed evidence before the trial court that such a withdrawal would result in the loss of employer contributions or harsh tax consequences. The trial court must consider these issues before requiring the defendant to make the lump sum distributive award payment. This case must be remanded to the trial court for a determination of whether the defendant has assets, other than the thrift plan, from which he can make the distributive award payment.

117 N.C. App. at 555, 451 S.E.2d at 650.

In *Embler*, the Court considered a very similar issue, and held:

Although defendant may in fact be able to pay the distributive award, defendant’s evidence is sufficient to raise the question of where defendant will obtain the funds to fulfill this obligation. As in *Shaw*, the court below ordered defendant to pay

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

the distributive award without pointing to a source of funds from which he could do so even though defendant had no obvious liquid assets. If defendant is ordered to pay the distributive award from a non-liquid asset or by obtaining a loan, the equitable distribution award must be recalculated to take into account any adverse financial ramifications such as adverse tax consequences. *Shaw* requires that we remand for further findings as to whether defendant has assets, other than non-liquid assets, from which he can make the distributive award payment.

159 N.C. App. at 188-89, 582 S.E.2d at 630.

That is, in both cases, the error was the trial court's failure to consider whether the defendant could pay the ordered amount. This Court's orders to remand in both cases were based on the tax consequences to the *payor*, not the *payee*, of the funds at issue, and the purpose of remand was to have the trial court determine whether the payors were able to make the payments ordered. These cases are thus inapposite to the case at hand, and we hold that the trial court did not abuse its discretion in crafting the order as it did.

As to defendant's argument regarding taxation, as this Court recently noted, "tax consequences are only considered' [i]f the court determines that an equal division is not equitable[.]" *Stovall v. Stovall*, —N.C. App.—, —, 698 S.E.2d 680, 687 (2010) (quoting N.C. Gen. Stat. § 50-20(c) (2009); alterations in original) (holding that "the trial court did not err in not considering the tax implications to defendant"). Indeed, "[i]t is error for a trial court to consider 'hypothetical tax consequences as a distributive factor.'" *Dolan v. Dolan*, 148 N.C. App. 256, 258, 558 S.E.2d 218, 220 (2002) (quoting *Wilkins v. Wilkins*, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993)). Defendant does not argue that she placed evidence of tax consequences before the trial court, and thus the trial court would have been in error to consider such consequences in its order. As such, this argument is without merit.

[3] Finally, defendant argues that the trial court erred by failing to classify and distribute two specific pieces of property—a check for \$2,288.26 from an insurance company to repair the roof of the marital home and plaintiff's Piedmont Aviation Credit Union Account—as marital property. We disagree.

Per statute, marital property is

CHEEK v. CHEEK

[211 N.C. App. 183 (2011)]

all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

N.C. Gen. Stat. § 50-20(b)(1) (2009).

This Court’s “review of an equitable distribution award ‘is limited to a determination of whether there was a clear abuse of discretion[.]’” *White*, 163 N.C. App. at 28, 592 S.E.2d at 270 (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833).

As to the check, there seems to be no dispute in the record that the check was issued by the insurance company for the purposes of partially funding necessary repairs to the roof of the marital home. The relevant finding of fact stated that plaintiff “received an insurance check for \$2,286.26 for damages to the roof of the home distributed to [plaintiff]. That amount is needed and is to be used to repair the roof and does not add net value to” the stated value of the marital home. Defendant argues that, because the trial court found that the money was obtained during the marriage and prior to separation, and that no evidence supported its being “acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage” to make it separate property, the trial court was required to consider it marital property.

However, as noted above, such determinations are up to the trial court’s discretion. Here, the trial court clearly determined that the money at issue was part of the value assigned to the house and land. As the money was clearly intended to repair the house—that is, to bring it back up to its stated value—we cannot say that the trial court abused its discretion in not considering it as a piece of marital property distinct from the value of the house.

As to the bank account, plaintiff testified that the account, containing a total of \$1,531.65, did exist on the date of separation, and that it was funded by “money that comes out of my check and goes into a savings account, more or less, to pay different things during the

WATSON v. BRINKLEY

[211 N.C. App. 190 (2011)]

year.” That is the only evidence in the record as to the source of the funds in that account, and defendant is correct in stating that the trial court did not make any findings of fact as to the account or, indeed, mention it in the order at all. As such, we remand to the trial court for findings solely related to that account and for amending the equitable distribution order if necessary solely on the basis of those findings.

Affirmed in part, remanded in part.

Judges HUNTER and CALABRIA concur.

ROSA R. WATSON, LINWOOD W. WATSON AND BYRUM W. WATSON PETITIONERS V.
LILLIAN P. BRINKLEY, RANDALL ALAN FREULER AND CATHY J. FREULER,
RESPONDENTS

No. COA10-1145

(Filed 19 April 2011)

**Highways and Streets— cartway—final judgment by clerk—
exceptions after jury of view report—not reviewed**

A judgment entered by the clerk ordering that a permanent cartway be established across respondents’ land and appointing a jury of view became final when neither party filed exceptions or an appeal. A request for a trial *de novo* after the report of the jury of view and a request that an additional party be added were correctly denied.

Appeal by respondents from order entered 27 May 2010 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 9 February 2011.

Moseley, Elliott & Dickens, L.L.P., by Bradley A. Elliott, for the petitioner-appellees.

Whitaker Law Office, by Cary Whitaker, for the respondent-appellants.

STEELMAN, Judge.

The trial court correctly held that respondents’ failure to timely appeal the judgment of the clerk of court establishing petitioners’

WATSON v. BRINKLEY

[211 N.C. App. 190 (2011)]

right to a cartway across respondents' land rendered that judgment final. The trial court was without jurisdiction to review the establishment of the right of petitioners to a cartway, and to consider alternative routes over the property of adjacent landowners.

I. Factual and Procedural History

Rosa Watson, Linwood Watson, and Byrum Watson (collectively "petitioners") own 49.57 acres of land in Halifax County, North Carolina. Petitioners' tract of land lacks access to a public road. Lillian Brinkley, Randall Frueler and Cathy Frueler (collectively "respondents") own land that is adjacent to petitioners' tract and is located between petitioners' land and the only public road in the vicinity, State Road No. 1405. Petitioners harvested timber from their property and filed a petition before the clerk of the superior court seeking a permanent cartway across respondents' land to gain access to a public road, pursuant to N.C. Gen. Stat. § 136-68 *et seq.*

On 13 March 2008, the clerk entered judgment ordering that a permanent cartway be established across respondents' land and appointed a jury of view to determine the location of the cartway and to assess damages. Neither party filed exceptions or an appeal from the judgment. The report of the jury of view was filed on 20 August 2008. Respondents filed exceptions to this report, and requested that an additional party, Robert Harris ("Harris"), be added. Respondents asserted that Harris' property offered an alternate route from petitioners' land to a public road. On 17 November 2008, the clerk of superior court ordered that Harris be joined as a party. On 16 January 2009, Linda E. Harris, Anthony L. Conner, and Melissa H. Conner were also added as parties who owned land that could serve as alternate locations for the cartway to petitioners' lands. Petitioners appealed this order to the superior court. On 7 April 2009, the trial court held that the clerk's judgment of 13 March 2008 granting petitioners a cartway across respondents' land was a final judgment since neither party excepted or appealed within the ten day time period set forth in N.C. Gen. Stat. § 1-301.2(e) (2008). This judgment was a final determination of the petitioners' and original respondents' rights. The trial court vacated the clerk's orders adding additional parties and remanded the case to the clerk of superior court to determine respondents' objections to the jury of view report.

On 31 December 2009, the jury of view submitted a modified report. The report established a cartway eighteen feet in width across respondents' property. The report also listed the respondents' damages

WATSON v. BRINKLEY

[211 N.C. App. 190 (2011)]

as \$5,750, the decrease in fair market value of respondents' property as a result of the cartway. Respondents filed four exceptions to the modified jury of view report. They asserted that (1) there were alternative routes for the cartway that the report did not consider; (2) the compensation provided did not conform to N.C. Gen. Stat. Chapter 40A, Article 4; (3) the cartway was not described properly because a survey had not been completed; and (4) the cartway was not necessary, reasonable, or just under the circumstances. On 12 April 2010, after hearing the arguments and evidence of both parties, the clerk overruled the exceptions of the respondents and confirmed the jury of view report. On 21 April 2010, respondents appealed the clerk's order and requested a trial *de novo*. On 7 May 2010, respondents once again requested that Robert and Linda Harris and Anthony and Melissa Conner be added as parties to the action.

On 27 May 2010, the trial court affirmed the modified jury of view report and denied respondents' request to add additional parties.

Respondents appeal.

II. Trial *De Novo*

In their first argument, respondents contend that the trial court erred in not granting a trial *de novo* to consider the clerk's grant of a cartway to petitioners. We disagree.

A. Standard of Review

When reviewing a question of subject matter jurisdiction, the appellate standard of review is *de novo*. *Keith v. Wallerich*, — N.C. App. —, —, 687 S.E.2d 299, 302 (2009). A *de novo* standard of review requires the appellate court to examine the case anew as if there had never been a trial court ruling. *See In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964).

B. Analysis

Respondents contend that the trial court should have considered all matters appealed from the clerk of court *de novo*.

N.C. Gen. Stat. § 1-301.2(e) provides that "a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing *de novo*." This statute clearly establishes the right of parties to appeal a clerk's order granting a cartway and receive a trial *de novo* in superior court. *See Jones v.*

WATSON v. BRINKLEY

[211 N.C. App. 190 (2011)]

Robbins, 190 N.C. App. 405, 409, 660 S.E.2d 118, 121 (2008), *disc. review denied*, 362 N.C. 472, 666 S.E.2d 120 (2008). The clerk's order establishing a cartway was a final judgment, and will become a final determination of the parties' rights unless they appeal. *Candler v. Sluder*, 259 N.C. 62, 66, 130 S.E.2d 1, 4 (1963) ("An order of a clerk of superior court adjudging the right to a cartway is a final judgment and an appeal lies therefrom."). The statute also requires that the parties appeal a clerk's order within ten days to receive a trial *de novo* in superior court. *Mechanic Construction Co. v. Haywood*, 56 N.C. App. 464, 465, 289 S.E.2d 134, 134 (1982) (analyzing a predecessor statute, this Court held, "as petitioners failed to perfect their appeal from the order of the Clerk by giving notice of appeal to the Superior Court within ten days of the entry of the order The court was, therefore, without jurisdiction to review the ruling.").

Respondents never appealed the clerk's judgment of 13 March 2008 establishing a cartway across their land. The trial court did not err in refusing to grant respondents a trial *de novo*.

III. Failure to Add Additional Parties

In their second argument, respondents claim that the trial court erred by failing to add additional parties to this action. This argument is also controlled by respondents' failure to appeal the clerk's 13 March 2008 judgment within the ten day period established by N.C. Gen. Stat. § 1-301.2(e). The clerk's judgment establishing petitioners' right to a cartway across respondents' land was a final judgment and the jury of view was required to execute this judgment. *Triplett v. Lail*, 227 N.C. 274, 275, 41 S.E.2d 755, 756 (1947) ("The appointment of a jury of view, to locate, lay off, and mark the bounds of the easement thus established, is the mechanics, in the nature of an execution, provided for the enforcement of the order."). Respondents' failure to appeal the clerk's 13 March 2008 judgment prevents the addition of other parties to the proceedings.

The judgment of the trial court is affirmed.

AFFIRMED.

Judges ELMORE and ERVIN concur.

FEIERSTEIN v. N.C. DEP'T OF ENV'T & NATURAL RES.

[211 N.C. App. 194 (2011)]

STEVEN FEIERSTEIN & LISA FEIERSTEIN, PLAINTIFFS v. N.C. DEPT. OF
ENVIRONMENT & NATURAL RESOURCES, DEFENDANT

No. COA10-912

(Filed 19 April 2011)

**Damages and Remedies— negligence—calculation of property's
value—fair market value**

The Industrial Commission erred in a negligence action, arising from defendant's issuance of a septic permit and then its later determination that the lot was unsuitable for a septic system, by using fair market values of the pertinent property from 2007 rather than 2001 for calculating damages. The injury to plaintiff's real property was completed as of 14 February 2001, and there was not a continuing wrong or intermittent or recurring damages.

Appeal by defendant from order entered 21 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2011.

George B. Daniel, P.A., by George B. Daniel; and Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for plaintiff-appellees.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for defendant-appellant.

STEELMAN, Judge.

Where the injury to plaintiff's real property was completed as of 14 February 2001 and there was not a continuing wrong or intermittent or recurring damages, the correct measure of damages was the difference between the fair market values of the property immediately before and after the injury. The Commission erred in using fair market values of the property from 2007.

I. Factual and Procedural Background

Steven and Lisa Feierstein (plaintiffs) initiated this negligence action after the North Carolina Department of Environmental and Natural Resources (NCDENR) (defendant) conducted a soil evaluation and issued a septic permit for their building lot in 1987 and then later determined that the lot was unsuitable for a septic system in 2001. The facts of this case are set forth in the first appeal to this

FEIERSTEIN v. N.C. DEP'T OF ENV'T & NATURAL RES.

[211 N.C. App. 194 (2011)]

Court. *See* *Feierstein v. N.C. Dep't of Env'tl. & Natural Res.*, — N.C. App. —, 690 S.E.2d 558 (2010) (unpublished).

In the first appeal, this Court reversed the Commission's award of damages based upon plaintiffs' out-of-pocket expenditures, and remanded the case to the Commission "for the entry of a new order with respect to the issue of damages that utilizes a legally permissible measure of damages." *Id.* On remand, the Commission determined that the proper measure of damages was the diminution in value of plaintiffs' property.

The Commission determined that the fair market value of the property on 7 December 2000 with the permit was \$125,000.00, and that with the revocation of the permit, the "marketability of the lot was reduced by 70%." The Commission went on to find that the appraised value of the property as of 11 July 2007 was \$300,000.00 with all permits in place and that the value as of 11 July 2007 without the permit was \$70,000.00 to \$80,000.00. Based upon these findings, the Commission awarded damages to plaintiffs of \$220,000.00. Defendant appeals.

II. Damages based upon Diminution in Value for
a Completed Injury

In its only argument, defendant contends that the Commission erred in calculating the diminished value of plaintiffs' property using values from 2007 rather than 2001. We agree.

Where the injury to real property is completed or by a single act becomes a *fait accompli*, and where it does not involve a continuing wrong or intermittent or recurring damages, a plaintiff is entitled to recover the difference between the fair market value of the property *immediately* before and *immediately* after the damage. *See Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967); *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 464, 469, 17 S.E.2d 646, 649 (1941); *Huberth v. Holly*, 120 N.C. App. 348, 353, 462 S.E.2d 239, 243 (1995); *Huff v. Thornton*, 23 N.C. App. 388, 393-94, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975). Our Supreme Court has adhered to this diminution in value formula in cases where the injury is completed, and has held that a trial court's instruction for damages based upon diminution in value was correctly stated as the difference in market value immediately before the damage and immediately after the damage. *See Paris*, 271 N.C. at 484, 157 S.E.2d at 141; *Huff*, 23 N.C. App. at 393-94, 209 S.E.2d at 405.

FEIERSTEIN v. N.C. DEP'T OF ENV'T & NATURAL RES.

[211 N.C. App. 194 (2011)]

In the present case, the injury to plaintiffs' property was complete on 14 February 2001, the date that defendant issued a final denial letter for plaintiffs' septic permit application. Damages to plaintiffs' property should have been computed based upon the diminution of value as of 14 February 2001. The market values of the property as of 11 July 2007 are irrelevant to plaintiffs' damages in this case.

The Commission erred in awarding plaintiffs \$220,000.00 in damages based upon market values from 2007.

The Commission's order awarding plaintiffs \$220,000.00 in damages is reversed and remanded to the Commission for calculation of damages based upon diminution in value that utilizes the fair market values immediately before and after the injury.

REVERSED AND REMANDED.

Judges ELMORE and ERVIN

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 APRIL 2011)

ARCE v. BASSETT FURN. INDUS., INC. No. 10-1064	Indus. Comm. (176776) (176797)	Affirmed
B&K COASTAL, LLC v. TRIANGLE GRADING & PAVING, INC. No. 10-382	New Hanover (07CVS1050)	Dismissed
BUTTON v. MCKNIGHT No. 10-858	Wake (09CVS16504)	Affirmed
FORD v. ALL-DRY OF THE CAROLINAS, INC. No. 10-931	Haywood (07CVS1547)	Affirmed
GENWORTH LIFE & ANNUITY INS. v. ABERNATHY No. 10-242	Gaston (08CVS2507)	Affirmed
GERALD v. HOUS. AUTH. OF CITY OF DURHAM No. 10-1179	Durham (09CVS4288)	Affirmed
IN RE J.O.W. No. 10-1312	Greene (09JA09-11)	Affirmed
IN RE K.R. No. 10-1380	Madison (08JA29-30)	Reversed and Remanded
IN RE MILITANA No. 10-880	Cherokee (07E98)	Affirmed
NIKOPOULOS v. HAIGLER No. 10-616	Stanly (09CVS119)	Affirmed
SAMPSON CNTY. v. PARKER FAMILY REAL ESTATE, LLC No. 10-588	Sampson (07CVS357)	Vacated
SHALOM HOUSE APARTMENTS v. SAFARO No. 10-1187	Beaufort (10CVD162)	Appeal Dismissed
STATE v. ARRINGTON No. 10-1205	Lenoir (10CRS317)	Affirmed

STATE v. COFFIELD No. 10-956	Pitt (09CRS56817) (09CRS56819) (09CRS56822)	Vacated and Remanded
STATE v. CORTEZ No. 10-474	Johnston (07CRS56935)	Reversed and Remanded
STATE v. CRUDUP No. 10-326	Franklin (08CRS52500)	No Error
STATE v. DUNN No. 10-543	New Hanover (09CRS51033)	No error in part, no prejudicial error in part.
STATE v. DURHAM No. 10-873	Forsyth (09CRS52746)	Affirmed
STATE v. GILL No. 10-1198	Carteret (09CRS54961)	No Error
STATE v. HILL No. 10-1463	Catawba (09CRS1521)	No Error
STATE v. JOHNSON No. 10-1216	Craven (08CRS54078)	No Error
STATE v. LESKIW No. 10-834	Pitt (05CRS52250)	Affirmed
STATE v. MADDEN No. 10-1301	Buncombe (06CRS55365) (06CRS60082) (06CRS60084)	Affirmed
STATE v. NIX No. 10-1371	Guilford (09CRS24769) (09CRS82858)	Affirmed
STATE v. PHIFER No. 10-1256	Mecklenburg (08CRS251903-05) (09CRS1737)	No Error
STATE v. PRESTWOOD No. 10-1302	Buncombe (09CRS1552) (09CRS1553) (09CRS57120)	No prejudicial error.
STATE v. REID No. 10-597	Durham (08CRS53041)	No Error

STATE v. ROBINSON No. 10-1099	Forsyth (08CRS60567-69)	No Error
STATE v. SANDERS No. 10-801	Wake (08CRS70892) (08CRS70895) (09CRS11884)	No prejudicial error at trial; remanded for resentencing.
STATE v. SINGLETON No. 10-1010	Forsyth (09CRS57553-54)	No Error
STATE v. SOOTS No. 10-870	Forsyth (10CRS50271)	No Error in Part; Remand in Part
STATE v. STANDIFER No. 10-1245	Orange (07CRS56776-78)	No Error
STATE v. VASQUEZ No. 10-1027	Mecklenburg (08CRS241033-34)	No Error
STATE v. VEREEN No. 10-940	Columbus (05CRS6388) (06CRS5180) (08CRS52778)	No Prejudicial Error
STATE v. WORSHAM No. 10-1228	Rowan (06CRS3026) (06CRS50871)	No error in part. Dismissed in part
STEELMAN v. SELECT MED. CORP. No. 10-521	Indus. Comm. (681638)	Affirmed
TRACHTMAN LAW FIRM, PLLC v. CSAPO No. 10-881	Wake (09CVD7465)	Affirmed
WALLS v. CITY OF WINSTON-SALEM No. 10-1248	Forsyth (09CVS3121)	Affirmed
WESLEY CHAVIS, JR. FUNERAL HOME v. ESTATE OF PETER RADCLIFFE No. 10-1329	Mecklenburg (09CVS355)	Affirmed

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

BARBARA GARLOCK, ANDREW SNEE, BY AND THROUGH JULIE SNEE, HIS PARENT AND GUARDIAN, DAVID EISENSTADT, BY AND THROUGH ALISON EISENSTADT, HIS PARENT AND GUARDIAN, WOODROW BARLOW, BY AND THROUGH AVA BARLOW, HIS PARENT AND GUARDIAN, JUDY PIDCOCK, ERIN BYRD, GERALD WRIGHT, AND COLETHIA EVANS, CITIZENS OF WAKE COUNTY, NORTH CAROLINA, PLAINTIFFS V. WAKE COUNTY BOARD OF EDUCATION, A PUBLIC BODY, AND ITS MEMBERS, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA10-1123

(Filed 19 April 2011)

1. Public Records— Open Meetings Law—misapprehension of order—case properly dismissed—immediate hearing—no prejudice

Plaintiffs' argument on appeal in an action seeking relief under North Carolina's Open Meetings Law that the trial court "dismissed" their complaint *ex mero motu* was a misapprehension of the trial court's order. The trial court made findings of fact and conclusions of law and ruled upon the merits of plaintiffs' claims, and as there were no further claims to be determined, dismissed the case. Defendant's argument that the trial court erred by hearing the case on the merits only eight days after the complaint was filed and before an answer was filed or discovery was conducted was overruled. Defendants suffered no prejudice from the "immediate" hearing, as the judgment was predominantly in their favor and denied the most significant relief sought by plaintiffs.

2. Appeal and Error— standard of review—violation of Open Meetings Law—de novo—appropriate remedy—abuse of discretion

The Court of Appeals applied a *de novo* standard of review to the issue of whether a violation of the Open Meetings Law (OML) occurred. The Court of Appeals reviewed the trial court's determination of the appropriate remedy for violation of the OML for abuse of discretion.

3. Public Records— Open Meetings Law—violations—no affirmative relief

The trial court in an action concerning North Carolina's Open Meetings Law (OML) properly found violations of the OML as to a ticketing procedure put into place and in the exclusion of the public from a Committee of the Whole (COW) meeting. The trial

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

court erred in concluding that a violation of the OML occurred when defendants failed to make accommodations for members of the public who were disabled. The trial court did not abuse its discretion by denying plaintiffs affirmative relief for defendants' violations.

Appeal by plaintiffs and defendants from an order entered 14 May 2010 by Judge William R. Pittman in Superior Court, Wake County. Heard in the Court of Appeals 24 February 2011.

Blue Stephens & Fellers LLP by Dhamian Blue; North Carolina State Conference of the NAACP by Irving Joyner; UNC Center for Civil Rights by Mark Dorosin; North Carolina Justice Center by Jack Holtzman; Southern Coalition for Social Justice by Anita Earls; and Wood Jackson PLLC by W. Swain Wood, for plaintiffs-appellants.

Shanahan Law Group, PLLC by Kieran J. Shanahan and John E. Branch, III, for defendant-cross appellant Wake County Board of Education.

STROUD, Judge.

Intense public interest in actions under consideration by defendant Wake County Board of Education led to increased attendance by members of the public at Board meetings in early 2010, so that on 23 March 2010, the meeting rooms for the Committee of the Whole ("COW") meeting and full Board meeting could not accommodate all who wished to attend. Plaintiffs filed this lawsuit seeking relief under North Carolina's Open Meetings Law stemming from the exclusion of members of the public from the 23 March 2010 meetings, and as requested by the plaintiffs, the trial court heard the entire matter on the merits only eight days after the lawsuit was filed. We affirm the trial court's order which found that on 23 March 2010, defendants violated the Open Meetings Law by their last-minute adoption of a ticketing policy and by exclusion of members of the public from the COW meeting, but we vacate the trial court's conclusion as to defendants' failure to accommodate a disabled person because the Open Meetings Law makes no distinction between access by disabled members of the public and access by non-disabled members of the public. The trial court properly considered defendants' actions according to the standard of reasonableness of opportunity for public access to the meetings. In addition, the trial court properly exercised its discretion by declining to grant affirmative relief and dis-

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

missing the case where the violations occurred only on 23 March 2010, defendants have taken reasonable measures to avoid future violations, and the violations were not committed in bad faith.

I. Procedural background

On 6 May 2010, a “diverse group of Wake County citizens” (“plaintiffs”) issued civil summons to the Wake County Board of Education (“Board”) and its members in their official capacities (the Board and individual defendants are hereinafter referred to collectively as “defendants”) and filed a complaint against defendants for relief pursuant to the North Carolina Open Meetings Law, N.C. Gen. Stat. § 143-318.16 *et seq.* The complaint asked the court to “[e]nter a declaratory judgment that Defendants violated the Open Meetings Law” at the 23 March 2010 meetings; “[d]eclare null and void all actions taken at the [Wake County Board of Education] meetings held on March 23, 2010;” and “[e]nter an injunction requiring Defendants to . . . [c]onduct all meetings openly[.]” The summons and complaint was accompanied by a “Notice of Hearing” to defendants stating that “Plaintiff’s Complaint for Relief Under Open Meetings Law will be heard at 2:00 p.m. on Wednesday May 12, 2010[.]”

On 10 May 2010, plaintiffs filed a motion for preliminary and permanent injunctions and declaratory judgment pursuant to N.C. Gen. Stat. §§ 143-318.16¹ and 143-318.16A.² Plaintiffs also filed ten affidavits, accompanied by numerous exhibits, which defendants contend that they did not begin to receive until “[a]fter the close of business on May 10, 2010[.]” Plaintiffs also filed and served an “Amended Notice of Hearing” on 10 May 2010 stating that Judge William R. Pittman would preside over the hearing on 12 May 2010 rather than Judge Donald W. Stephens, but, other than the change in the judge, the substance of the amended notice of hearing was identical to notice of hearing filed on 6 May 2010.

On 11 May 2010, defendants replied with an “Objection, Motion to Strike, and Motion for Appropriate Relief,” contending that plaintiffs’

1. N.C. Gen. Stat. § 143-318.16 (2009) states, in pertinent part, that “[t]he General Court of Justice has jurisdiction to enter mandatory or prohibitory injunctions to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article.”

2. N.C. Gen. Stat. § 143-318.16A(a) (2009) states, in pertinent part, that “[a]ny person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void.”

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

motion forced defendants to “respond to Plaintiffs’ Motion for Preliminary and Permanent Injunctions and Declaratory Judgment, and to rebut at least six (6) affidavits provided to Defendants **less than forty-six (46) hours prior to the hearing**” in violation of N.C. Gen. Stat. § 1A-1, Rule 6(d).³ (Emphasis in original.) Defendants further contended that plaintiffs’ motion “asks the Court to rule on the merits of the case, even though Defendants have not had a chance to respond to Plaintiff’s Complaint.” Defendants repeated, that “Plaintiffs are asking this Court to make an adjudication on the merits of this case without providing Defendants with the opportunity to even Answer the allegations contained in the Complaint, let alone engage in discovery or any form of due process.” Defendants asked the trial court to “continue [the hearing] to a subsequent date in a manner consistent with the North Carolina Rules of Civil Procedure.”

On 12 May 2010, plaintiffs submitted a “Memorandum in Support of Plaintiffs’ Motion for Injunctive Relief and a Declaratory Judgment[.]” The trial court conferred with counsel for the parties on 12 May 2010 and continued the hearing until 14 May 2010 to allow more time for defendants to review the affidavits filed by plaintiffs and to respond to the affidavits. On 13 May 2010, defendants filed a “Brief in Opposition to Plaintiffs’ Motion for Preliminary and Permanent Injunctions and Declaratory Judgment” as well as five affidavits and numerous exhibits. Defendants did not file an answer to the complaint.

On 14 May 2010, the trial court held a hearing upon plaintiffs’ complaint and motions; on the same day, the trial court entered an order stating that the court had considered “the entire record, the arguments of counsel and the applicable law” and made the following findings of fact:

3. N.C. Gen. Stat. § 1A-1, Rule 6(d) (2009) states that “[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.”

1. The Wake County School Board (Board) operates the public schools of Wake County, North Carolina, and its nine members are elected by the voters of Wake County.
2. The plaintiffs are citizens and residents of Wake County who desire to attend meetings of the Board.
3. The Board has meetings of the Board and the Committee of the Whole (COW) twice each month which are normally held in the Board's offices.
4. Recent meetings of the Board have generated significantly greater public attention and desire to attend than the Board normally experiences.
5. In anticipation of an extraordinarily large crowd for the March 23, 2010 meeting of the Board and the COW, the Board initiated measures to handle the crowd.
6. The measures involved the issuance of tickets to the Board meeting and limiting the public's attendance to those who had tickets, excluding the public from the room in which the COW met, and the provision of overflow space in which those who could not enter the meeting room could observe the meetings on live electronic audiovisual feeds.
7. Some of the plaintiffs were prevented or deterred from attending one or both of the meetings as a result of the measures.
8. The ticketing procedures changed over the course of issuance without notice to the public.
9. One early ticketing requirement required the holder of a ticket to remain on the premises for several hours prior to the meeting.
10. One of the plaintiffs was denied accommodation for a disability at meetings on March 2.
11. The Board, through arrangements with local media outlets, provides live audiovisual transmission of its meetings through a cable television station and, since December, 2009, the internet via the website of another local television station.
12. Meetings of the COW are also simultaneously broadcast on the internet through the same arrangement.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

13. The live audiovisual broadcasts within the Board offices for the overflow crowd have not always been reliable.

14. Subsequent to the meetings of March 23, 2010, the Board has made efforts to improve the technical quality of the simultaneous broadcast to the overflow rooms.

15. The Board makes provisions for public comment from members of the public who are present at Board offices but who cannot secure a seat in the meeting room.

16. The Board normally makes available for public comment more time than is required by the law of North Carolina.

17. The Board has refused requests to move the meetings to larger venues.

18. The press has full access to Board and COW meetings.

The trial court made the following relevant conclusions of law:

2. The Board and the COW are public bodies.

3. The Board is required by North Carolina General Statute §143-318.9 *et seq.* [sic] (the Open Meetings Law) to take reasonable measures to provide for public access to its meetings.

4. The provision for simultaneous broadcast of its meetings on television and over the internet are reasonable measures.

5. The provision of overflow rooms to accommodate members of the public who cannot find seats in the meeting rooms and for live audiovisual broadcast of its meetings into the overflow rooms are reasonable measures.

6. The maintenance of safety and security for members of the public, members of the Board, staff and the press is reasonable.

7. The Board is not required by any provision of North Carolina law to change the venue of its meetings if reasonable measures can be taken to accommodate the members of the public who wish to attend.

8. A ticketing procedure is not necessarily unreasonable with adequate public notice.

9. A ticketing procedure requiring a ticket holder to remain on the premises for hours preceding a meeting is unreasonable.

10. Complete exclusion of members of the public from meetings of the COW prior to the meetings is unreasonable.

11. Failing to make accommodations for members of the public who are disabled is unreasonable.

12. The Court cannot conclude on this record that the Board engages in continuous violations of the Open Meetings Law or that past violations, if any, will reoccur.

13. The Court cannot conclude on this record that any alleged violation of the Open Meetings Law affected the substance of any action of the Board.

14. The Court cannot conclude on this record that any alleged violation of the Open Meetings Law prevented or impaired public knowledge or understanding of the people's business.

15. The Court cannot conclude on this record that any alleged violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in the Open Meetings Law.

16. The Board makes reasonable efforts to conduct its business in the open and in view of the public.

17. Meetings of the Board and the COW are open to the public as contemplated by the Open Meetings Law.

18. The Board is taking reasonable action to implement measures to address alleged past violations of the Open Meetings Law.

19. The Board is implementing reasonable measures to accommodate larger than normal crowds.

20. The Board has implemented reasonable measures to accommodate whatever crowd attends the May 18 meeting.

[21]. There are no grounds in law to invalidate any action of the Board.

The trial court then ordered the following:

1. The plaintiffs' motion for a preliminary injunction is denied.

2. The plaintiffs' motion for a permanent injunction is denied.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

3. The plaintiffs' motion for a declaratory judgment is denied.
4. The plaintiffs' complaint for relief under the Open Meetings Law is dismissed.

From this order, plaintiffs appeal, and defendants cross-appeal.

II. "Immediate hearing" under N.C. Gen. Stat. § 143-318.16C

[1] Plaintiffs state as their first issue that "the trial court made an error of law in dismissing the complaint *ex mero motu*." They note that defendants had not filed a motion to dismiss. In their cross-appeal, defendants argue that the trial court erred by hearing the case on the merits only eight days after the complaint was filed and before answer was filed or discovery was conducted. Although the two issues are different, both arise from the unusual procedural posture of this case. We will therefore first address how this case came to be heard on the merits on 14 May 2010 under N.C. Gen. Stat. § 143-318.16C.

Plaintiffs requested in their complaint that their claims be "[s]et down for immediate hearing" under N.C. Gen. Stat. § 143-318.16C. They also requested in their notice of hearing and amended notice of hearing that the trial court hear "Plaintiffs' Complaint For Relief Under Open Meetings Law" and in their "Memorandum in Support of Plaintiffs' Motion for Injunctive Relief and a Declaratory Judgment[,]" they urged the trial court to grant both preliminary and permanent injunctive relief as well as a declaratory judgment voiding actions of the Board. Defendants objected to a full hearing on such short notice, filing their "Objection, Motion to Strike, and Motion for Appropriate Relief" and requesting at the outset of the hearing that the trial court limit its consideration to the request for preliminary injunction and seeking sufficient time to answer and conduct discovery prior to a full hearing on the merits.

At the start of the hearing on 14 May 2010, defendants reiterated their objection to proceeding on any matters other than the motion for preliminary injunction. The trial court responded as follows:

It was the Court's intention to as we talked in the conference call, to proceed as if this were a hearing on preliminary injunction, mainly because of the lack of notice. There's no notice. But the time period given to the School Board to reply in the—after reading all the affidavits and the briefs, does that still apply, you still need more time?

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

Counsel for defendants responded that they were satisfied with the additional time for purposes of a hearing on a preliminary injunction but were concerned only about the “scope of the relief,” as the plaintiffs’ brief in support of their motion “seems to be looking for today, some final adjudication on the merits.” The trial court asked, “What more would Defendant need to do to proceed on the whole thing?” Defendants’ counsel responded that they would need time to file an answer, to “conduct discovery in the ordinary course” and to take depositions, noting that “even though the law in this area requires expedited consideration, it does not obviate the ordinary aspects of the North Carolina Rules of Civil Procedure.” Defendants’ counsel also noted that plaintiffs were seeking to

void past actions of the board. We’re not prepared today to address that and the implication it would have for action that’s been taken, there’s a broad range of action that’s been taken they’re asking to undo. So I’d say, in addition, that that’s why we’re not prepared to address the whole enchilada today.

Plaintiffs’ counsel then addressed the issue regarding the scope of the relief sought, as follows:

[O]n the issue of the rendering actions taken null and void, that is discussed at the end of our brief. The statute sets out, clearly appears to contemplate a compressed time frame for making decisions on that. In fact, it requires the Plaintiffs to file the action within 45 days of the incident complained of and that’s what we’ve done. And clearly I think the statute as a whole invests the Court with an enormous amount of equitable discretion in fashioning appropriate relief in these instances. And so we think it would be appropriate if the Court deems it to be so, applying the factors, to consider that relief today, as well.

Without stating whether it intended to consider only the preliminary injunction or “the whole enchilada[,]” the trial court then heard the arguments of the parties.

Plaintiffs never mentioned a preliminary injunction during their first argument. They requested that the court grant the following relief:

Number one, what we’re asking for, Your Honor, is clear guidance from this Court that what happened on March 23rd was wrong; that it violated the open meetings law.

. . . .

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

Number two, Your Honor, we're asking for clear guidelines going forward, including for May 18th, which I would just note, is the day after the 56th anniversary of the Supreme Court's decision in Brown versus Board of Education. We're asking for clear guidelines going forward that will prevent things like this from happening again.

Number one[sic], we're asking that there be no ticket policy.

....

Number two [sic], we're asking them to be required to come up with some contingency plans for situations where the level of public interest and sustained engagement and the known desire for public attendance is so overwhelming, have some plans. What are our back up locations? Why should the News and Observer be the ones who have to track down alternative locations?⁴

Throughout their argument, defendants continued to stress that the trial court should consider only a preliminary injunction, although they also contended that plaintiffs were not entitled to a preliminary injunction. In response, plaintiffs stated:

Mr. Shanahan talks about the issue of the extraordinary remedy of the injunction. It is an extraordinary remedy. There's absolutely no doubt under the enabling statute and the open meetings law that the Court has that power. The statute expressly gives the Court the power to issue mandatory and prohibitory injunctions And the statute also gives the Court all that other broad discretion, and it really is in the Court's hand to exercise that discretion and to fashion a remedy that is consistent with the

4. This is apparently a reference to a letter sent on the morning of 23 March 2010 from Orage Quarles, III, president and publisher of *The News and Observer*, in Raleigh, N.C. to the Board, stating that the Fletcher Theater at the Progress Energy Performing Arts Center was available for the meeting to be held at 3:00 p.m. that same day and that *The News and Observer* and WRAL would pay the cost to rent the facility. Also included in the record is the affidavit from Steve Hammel, vice president and general manager of WRAL-TV in Raleigh, N.C., which states that he telephoned the Board on 23 March 2010 "to offer . . . the use of the auditorium at the Progress Energy Center for the Board meeting that afternoon, and that WRAL would pay any associated costs for use of the facility." However, we note that N.C. Gen. Stat. § 143-318.12(b)(2009) provides that if an "official meeting" will be held "at any time or place other than a time or place shown on the schedule" of regularly scheduled meetings, the public body must give notice of the change at least "48 hours before the time of the meeting." (Emphasis added.) Therefore, if the Board had accepted these offers made on the same day of the meeting, it would have violated N.C. Gen. Stat. § 143-318.12 by changing the meeting location from the regularly scheduled location without giving at least 48 hours advance notice.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

principles and the letter of what is really trying to be achieved by this law.

. . . .

In closing, I would just say that the . . . statute and the case law gives this Court enormous discretion in this situation to fashion a remedy that's effective, that's realistic, pragmatic, and consistent with the spirit and the letter of the law, and that's what we would ask the Court to do.

At the end of the hearing, there was further colloquy between counsel and the trial court in which plaintiffs' counsel suggested that the trial court review the video of the 23 March 2010 COW meeting, which was available over the internet. The trial court stated that it would review the video, along with the other materials submitted by the parties. Defendants' counsel then noted that "As far as the March 23rd Committee of the Whole, you don't need that today, because that doesn't involve the preliminary injunction, does it?" The trial court responded, "Well, if I can look at it today, I would, if it's available." The hearing ended at 10:54 a.m. the trial court filed its order that afternoon at 4:10 p.m.

Based upon the hearing transcript and the provisions of the order, it is apparent that the trial court heard the case on the merits, tacitly denying defendants' request for additional time for discovery, and issued an order which denied plaintiffs' claims on the merits and therefore dismissed the case. Plaintiffs argue that the trial court's dismissal was error as it was "*ex mero motu*[" while defendants on cross-appeal argue that they were deprived of procedural due process rights by the trial court's refusal to continue the full hearing on the merits and making adverse findings of fact when defendant had no opportunity even to file an answer, much less conduct discovery.

N.C. Gen. Stat. § 143-318.16C (2009) reads as follows, in its entirety: "Actions brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts." The statute is entitled "Accelerated hearing; priority." Our Courts have not ever considered the meaning or effect of setting an action "down for immediate hearing" as directed by N.C. Gen. Stat. § 143-318.16C. We find no prior cases which have addressed exactly how cases under the Open Meetings Law should be expedited or accelerated, although some prior cases have proceeded very quickly

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

from filing to disposition by the trial court. *See e.g. Gannett Pacific Corp. v. City of Asheville*, 178 N.C. App. 711, 711-12, 632 S.E.2d 586, 587 (Complaint filed 26 April 2005; final judgment entered 29 June 2005), *disc. review denied*, 360 N.C. 645, 638 S.E.2d 466 (2006); *Sigma Construction Co., Inc. v. Guilford County Board of Education*, 144 N.C. App. 376, 377-78, 547 S.E.2d 178, 179 (Complaint filed 16 March 2000; final judgment 25 April 2000), *disc. review denied*, 354 N.C. 366, 556 S.E.2d 578 (2001); *H.B.S. Contractors, Inc. v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 52, 468 S.E.2d 517, 520 (1996) (Complaint filed 4 January 1995; judgment entered 1 March 1995). Yet the statute does not specify what type of hearing should be held “immediate[ly]” or the procedure which should be used. Based on prior cases, it is clear that the Rules of Civil Procedure do apply to claims under the Open Meetings Law. *See Frank v. Savage*, — N.C. App. —, —, 695 S.E.2d 509, 512 (2010) (analysis of Open Meetings Law in the context of a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) dismissal); *Hensey v. Hennessy*, — N.C. App. —, —, 685 S.E.2d 541, 546 (2009) (the Rules of Civil Procedure “shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute.” (quoting N.C. Gen. Stat. § 1A-1, Rule 1)); *Campbell v. Greensboro*, 70 N.C. App. 252, 256-57, 319 S.E.2d 323, 326 (“Since [an annexation proceeding] is manifestly a ‘proceeding of a civil nature,’ the [rules of civil procedure] clearly apply to it, we believe, unless a different procedure is provided by statute, but only to the extent necessary to process the proceeding according to its nature.”), *disc. review denied and appeal dismissed*, 312 N.C. 492, 322 S.E.2d 553 (1984). We find no prior case in which the trial court has heard an entire case on the merits quite so “immediately” as here. Yet in this case, we need not determine whether the trial court erred by hearing the case on the merits “immediate[ly]” after filing of the action because to the extent that this was error, the error was invited by plaintiffs and was not prejudicial to the defendants.

Plaintiffs repeatedly argue in their briefs that they were not asking the trial court to rule on the merits of the case on 14 May 2010. But upon careful examination of the complaint, the notice of hearing, the amended notice of hearing, the plaintiffs’ memorandum submitted to the trial court, and the transcript of the hearing, it is apparent that plaintiffs did ask exactly that, and they got what they asked for. “[I]t is never wise to ask for something without being fully aware that you

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

may just get what you ask for.” *Southwest Bank of Omaha v. Herting*, 208 Neb. 347, 349, 303 N.W.2d 504, 506 (1981) (citation omitted). Defendants objected, but the trial court elected to rule upon all of the claims raised by the complaint and motions. As to invited errors, we have noted that

“[o]ur Courts have long held to the principle that a party may not appeal from a judgment entered on its own motion or provisions in a judgment inserted at its own request.” *Templeton v. Apex Homes, Inc.*, 164 N.C. App. 373, 377, 595 S.E.2d 769, 771-72 (2004) (internal citation omitted) (plaintiffs were precluded from appealing entry of summary judgment because they invited error when “the parties joined together to encourage the court to enter summary judgment on all issues in order to proceed immediately to the question of remedy”).

In re Estate of Pope, 192 N.C. App. 321, 330, 666 S.E.2d 140, 147 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 129 (2009). An appellant is not in a position to object to provisions of a judgment which are

in conformity with their prayer, and they are bound thereby. *Johnson v. Sidbury*, 226 N. C., 345, 38 S. E. (2d), 82; *Carruthers v. R.R.*, 218 N.C. 377, 11 S.E.(2d), 157. “A party cannot complain of an instruction given at his own request.” *Bell v. Harrison*, 179 N.C. 190, 102 S.E. 200. Neither should he be permitted to challenge the correctness of provisions contained in a judgment which were inserted at his request or in conformity with his prayer. Ordinarily an appeal will not lie from an order entered at the request of a party, and “it is immaterial that such request was in the alternative,” *Larson v. Hanson*, 210 Wis., 705, 242 N. W., 184. *Boyer et al. v. Burton*, 79 Ore., 662, 149 Pac., 83; *Silcox v. McLean*, 36 N. M., 196, 11 Pac. (2d), 541; *Schoren v. Schoren*, 110 Ore., 272, 222 Pac., 1096; *Blumenfeld & Co. v. Hamrick*, 18 Ala. App., 317, 91 Sou., 914; *In re Gurnsey’s Estate*, 61 Cal., 178, 214 Pac., 487; *State v. Howell*, 139 La., 336, 71 Sou., 529.

Dillon v. Wentz, 227 N.C. 117, 123, 41 S.E.2d 202, 207 (1947). Therefore, although it may have been the better practice for the trial court to hear only the motion for preliminary injunction on 14 May 2010 and then to permit some time for development of the case by discovery before a full hearing on the merits, the plaintiffs have no right to complain that the trial court did exactly what they asked. Plaintiffs’ argument that the trial court “dismissed” their complaint *ex*

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

mero motu is a misapprehension of the trial court's order. The trial court made findings of fact and conclusions of law and ruled upon the merits of plaintiffs' claims, and as there were no further claims to be determined, dismissed the case. This is no different than a judgment which "dismisses" a plaintiff's claim based upon a jury verdict which has found that the plaintiff is not entitled to the relief sought. *See Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) ("the trial court entered the jury's verdict and dismissed the action against defendants with prejudice.")

On the other hand, defendants did object to hearing the entire matter on the merits, both in their "Objection, Motion to Strike, and Motion for Appropriate Relief" and in oral argument at the hearing on 14 May 2010. But ultimately defendants suffered no prejudice from the "immediate" hearing, as the judgment is predominantly in their favor and denies the most significant relief sought by plaintiffs. Although defendants do not object to the trial court's disposition and ask that we affirm the judgment, they object to certain findings of fact and conclusions of law within the judgment which they perceive to be derogatory to them. Defendants ask us to remove these objectionable findings and conclusions, while affirming the order otherwise; they ask that we affirm the substance of the order dismissing plaintiffs' claims but remove from the order the parts they do not like. We reject this request as "inconsistent with the fundamental precept of Anglo-American jurisprudence that you cannot have your cake and eat it, too[.]" *I.T. Consultants, Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003). Even if the findings of fact which defendants argue are not supported by the evidence were erroneous, they were not required to support the trial court's conclusions of law and decretal, which were essentially favorable to defendants. We have stated that

[w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions. *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E.2d 712 (1981); *Allen v. Allen*, 7 N.C. App. 555, 173 S.E.2d 10 (1970).

Black Horse Run Property Owners Association-Raleigh, Inc. v. Kaleel, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). As discussed more fully below, we find that any errors in the order do not change the result.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

III. Standard of review

[2] Plaintiffs' arguments regarding our standard of review are based upon their misapprehension of the order as a dismissal which does not rule upon the merits of the case. In its response brief, defendants' argument as to our standard of review likewise misconstrues the order as a denial of a mandatory preliminary injunction. We must base our review on the order as it actually is, not as either party may have preferred it to be. As we have determined that the order was an adjudication on the merits, we must consider it as such. We have noted that

[a]llegations that a party violated the Open Meetings Law are considered by the Superior Court in its role as a trier of fact.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980).

Gannett Pacific Corp. v. City of Asheville, 178 N.C. App. 711, 713, 632 S.E.2d 586, 588 (2006). Whether a violation of the Open Meetings Law occurred is a question of law. We therefore apply *de novo* review to this portion of the decision of the trial court.

Knight v. Higgs, 189 N.C. App. 696, 699-700, 659 S.E.2d 742, 745-46 (2008).

Plaintiffs also challenge the trial court's denial of affirmative relief based upon the findings of fact and conclusions of law. We review the trial court's determination as to the appropriate remedy under N.C. Gen. Stat. § 143-318.16A (2009) for abuse of discretion.

Whether to declare a board's action null and void is within the discretion of the trial court, *see In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (where "may" is used, it will ordinarily be construed as permissive and not mandatory), and can be reversed

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

on appeal only if the decision is “manifestly unsupported by reason” and “so arbitrary that it could not have been the result of a reasoned decision.” [*White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)].

Dockside Discotheque, Inc. v. Board of Adjustment of Town of Southern Pines, 115 N.C. App. 303, 307, 444 S.E.2d 451, 453, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 634 (1994).

Plaintiffs have not argued that the findings of fact are not supported by the evidence. Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, the brief is to include the contentions of the appellant “with respect to each issue presented. Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” As plaintiffs have not argued that the findings of fact are not supported by the evidence, “the finding[s] [are] presumed to be supported by competent evidence and [are] binding on appeal.” *Langston v. Richardson*, — N.C. App. —, —, 696 S.E.2d 867, 870 (2010) (citation and quotation marks omitted). Thus, the trial court’s findings of fact “are presumed to be supported by competent evidence and are binding on this Court.” *Id.*

Plaintiffs do argue, however, that the trial court’s conclusions of law were in error. Plaintiffs argue that “[t]o the extent this Court determines that adjudication on the merits of Appellants’ claims was proper, the express terms of the trial court’s ruling compel a conclusion that the Board violated the Open Meetings Law.” We will therefore review the trial court’s conclusions of law *de novo*. See *Knight*, 189 N.C. App. at 700, 659 S.E.2d at 746.

IV. Plaintiffs’ appeal

[3] Plaintiffs argue that the trial court’s findings of fact compel a conclusion that the Board violated the Open Meetings Law. Plaintiffs call our attention to the following findings and conclusions of law:

5. In anticipation of an extraordinarily large crowd for the March 23, 2010 meeting of the Board and the COW, the Board initiated measures to handle the crowd.
6. The measures involved the issuance of tickets to the Board meeting and limiting the public’s attendance to those who had tickets, excluding the public from the room in which the COW met, and the provision of overflow space in which those who could not enter the meeting room could observe the meetings on live electronic audiovisual feeds.

7. Some of the plaintiffs were prevented or deterred from attending one or both of the meetings as a result of the measures.
8. The ticketing procedures changed over the course of issuance without notice to the public.
9. One early ticketing requirement required the holder of a ticket to remain on the premises for several hours prior to the meeting.
10. One of the plaintiffs was denied accommodation for a disability at meetings on March 2.

Based upon these findings, the trial court concluded, in part, as follows:

8. A ticketing procedure is not necessarily unreasonable with adequate public notice.
9. A ticketing procedure requiring a ticket holder to remain on the premises for hours preceding a meeting is unreasonable.
10. Complete exclusion of members of the public from meetings of the COW prior to the meetings is unreasonable.
11. Failing to make accommodations for members of the public who are disabled is unreasonable.

The trial court therefore concluded that three of the Board's actions were "unreasonable": (1) a ticketing procedure requiring a ticket holder to remain on the premises for hours preceding a meeting; (2) complete exclusion of members of the public from the COW meetings; and (3) failure to make accommodations for a disabled member of the public. The trial court also made a conclusion of law that "[t]he Board is required by North Carolina General Statute §143-318.9 *et.seq.* (the Open Meetings Law) to take reasonable measures to provide for public access to its meetings."

Although the order concludes that certain actions were "unreasonable," it does not specifically state that these actions were violations of the Open Meetings Law, despite its conclusion that the Open Meetings Law requires defendants to "take reasonable measures to provide for public access to its meetings." We must therefore consider the legal standard by which the trial court should determine whether an Open Meetings Law violation has occurred.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

N.C. Gen. Stat. § 143-318.10(a) (2009), provides in pertinent part as follows: “Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15, and 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.” All parties agree that the Board and the COW are both “public bodies” as defined by N.C. Gen. Stat. § 143-318.10(b); nor is there any dispute that the 23 March 2010 meetings of the Board and the COW were “official meetings” as defined by subsection (d) of N.C. Gen. Stat. § 143-318.10. The issue presented by this case is whether the 23 March 2010 meetings were “open to the public.” This also requires us to consider the meaning of the provision that “any person is entitled to attend such a meeting.” These are issues of first impression under North Carolina’s Open Meetings Law.

When a meeting is held in secret and without prior notice, or no member of the public is permitted to attend and no media access is permitted, a violation of the Open Meetings Law is clear. The situation we address here may perhaps be best described as an allegation of insufficient “openness” of the meeting. Saying that a meeting is “open” tells us very little, so courts generally consider many factors to determine if a meeting is truly open to the public. These factors may include the “notice for meetings, distribution of agendas, preparation and availability of minutes of meetings, location and characteristics of the meeting place, recordation of minutes, and the like.” Ann Taylor Schwing & Constance Taylor, *Open Meeting Laws* 2d § 5.1 (2000). Here, it is undisputed that proper public notice of the time and location of the meetings was given, substantial numbers of members of the general public attended the Board meeting and were given adequate time and opportunity to comment, and media outlets covered both meetings. It is also undisputed that due to heightened public interest in the issues before the Board, attendance at the COW and Board meetings had been increasing and, in fact, the Board expected a high attendance for the 23 March 2010 meetings. It is undisputed that substantially more members of the public than could be legally admitted to the meeting rooms wanted to attend, so many were excluded from the meeting rooms.

Plaintiffs do not clearly articulate the standard by which they claim a court should determine whether an Open Meetings Law violation has occurred but imply that exclusion of any person who wishes to attend is a violation, as the statute says that “any person is entitled to attend such a meeting.” N.C. Gen. Stat. § 143-318.10(a). Plaintiffs seem to argue that the exclusion of even one person from a meeting

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

may be a violation, even if the meeting room is filled to its legally permitted capacity by other members of the public. In contrast, defendants argue that the Open Meetings Law establishes a standard under which

a public body may not admit only certain categories of the public (i.e., registered voters, or Wake County residents) and exclude other categories of the public from a public meeting; any person may attend, meaning that attendance may not be limited to a particular classification or group of people. “The open meetings laws demand the *possibility* of public attendance, however, *not the certainty of attendance*. The exclusion of those who arrive when the adequately sized meeting room is full . . . does not convert an open meeting into a closed one.” Ann Taylor Schwing & Constance Taylor, *Open Meetings Laws*, § 5.90 (1994).

(Emphasis added by defendants.)

Defendants also argue that we must consider the provisions of the Open Meetings Law *in pari materia* with other statutory requirements applicable to school board meetings. N.C. Gen. Stat. § 115C-51 (2009), which governs the public comment period during regular meetings, provides in pertinent part that:

The local board of education shall provide at least one period for public comment per month at a regular meeting of the board. The board may adopt reasonable rules governing the conduct of the public comment period, including, but not limited to, rules (i) fixing the maximum time allotted to each speaker, (ii) providing for the designation of spokesmen for groups of persons supporting or opposing the same positions, (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions *when the number of persons wishing to attend the hearing exceeds the capacity of the hall*, and (iv) providing for the maintenance of order and decorum in the conduct of the hearing.

(Emphasis added.) Thus, N.C. Gen. Stat. § 115C-51(iii) recognizes that at times, the number of people who want to attend a meeting may exceed the “capacity of the hall” and makes specific provision for the Board to consider the comments of those with opposing viewpoints in this situation. If the exclusion of even one person from a school board meeting because of the capacity of the room would render the meeting illegal under the Open Meetings Law, N.C. Gen. Stat. § 115C-51(iii) would be unnecessary.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

Although North Carolina has never confronted the issue of insufficient “openness” of a public meeting, some other states have. *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 631 P.Ed 304 (1981) presents a very similar factual situation. In *Gutierrez*, the Court considered “The sole issue [of] . . . whether the fact that the Council Chambers were not large enough to accommodate all of the large crowd that appeared to attend the meeting, rendered invalid the approval of Elliott’s application on the ground that it was not a public meeting.” *Id.* at 399, 631 P.Ed at 305. An application “for permission to sell alcoholic beverages within 300 feet of a school generated a great deal of public interest and controversy” so that “[a]n overflow crowd arrived to attend the City Council meeting of July 28, 1980.” *Id.* The crowd exceeded the meeting room’s capacity of

156 persons. The rest of the crowd (including Petitioners) had to remain outside the Chambers. As persons left the Chambers, others were allowed to enter. Loudspeakers were set up outside the Chambers and were operative during at least a portion of the meeting so that those outside the Chambers could listen to the proceedings. The meeting was broadcast on an Albuquerque radio station and received extensive media coverage. A motion was made to move the meeting to a larger room at the beginning of the meeting, but was denied for a variety of reasons, including inadequate sound systems at alternative locations. Members of the public who registered were allowed to present their views to the Council. Proponents of the agenda items were allowed one hour to present their views; opponents of the items were ultimately allowed one hour and fifteen minutes to present their views.

Id. The petitioners in *Gutierrez* argued that “the meeting was not a public meeting as required by Section 10-15-1 of New Mexico’s Open Meetings Act on the ground that they were not allowed to attend and listen to the proceedings.” *Id.* The applicable statute provided that “The formation of public policy . . . shall not be conducted in closed meeting. All meetings of any public body, except the legislature, shall be public meetings and *all persons so desiring shall be permitted to attend and listen* to the deliberations and proceedings.” *Id.* (emphasis in original.) Petitioners contended that the provision that “all persons so desiring shall be permitted to attend and listen” meant that “all must be in the room or in the presence of the Council members, regardless of the size of the crowd and the limitations of the meeting hall.” *Id.* at 400, 631 P.Ed at 306.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

The Supreme Court of New Mexico rejected the petitioners' argument, noting that

[t]his narrow view would permit invalidation of any action by a public body by the simple method of overflowing the Chambers. Thus, the Council, to be safe, would have to hire the football stadium or hold its meetings in a wide open space. Even then, *reductio ad absurdum*, if a tree or other obstruction stood between an individual and the Council, he could claim that he was not permitted to "attend".

To "attend and listen" is equally susceptible of an interpretation that persons desiring to attend shall have the opportunity to do so, that no one will be systematically excluded or arbitrarily refused admittance, and that the meeting will not be "closed" to the public. The circumstances of this case make manifest the reasonableness of such an interpretation. Everyone desiring to attend the City Council meeting was afforded an opportunity to do so, but once the hall was filled, no others could be admitted.

Id.

The language of North Carolina's Open Meetings Law provides that "any person is entitled to *attend* such a meeting," N.C. Gen. Stat. § 143-318.10(a), but it does not include the words "and listen" as does the New Mexico statute. (Emphasis added.) Yet the two statutes are essentially the same; it would be logical to distinguish the two by saying that the North Carolina statute grants the right to "attend" a meeting but not to "listen" to the proceedings. We find the New Mexico court's analysis of its statute to be persuasive authority in our analysis of the North Carolina statute.

We are also guided by the purpose of the Open Meetings Law in our interpretation of N.C. Gen. Stat. § 143-318.10(a).

The singular goal of statutory construction "is to give effect to the intent of the Legislature." *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 354, 542 S.E.2d 668, 671, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001) (citation omitted). "To this end, the courts must refer primarily to the language of the enactment itself. [citation omitted] A statute that "*is free from ambiguity, explicit in terms and plain of meaning*" must be enforced as written, without resort to judicial construction." *Id.* at 354, 542 S.E.2d at 671-72 (emphasis in original) (citations omitted).

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 655, 566 S.E.2d 701, 704 (2002) (citation and quotation marks omitted). The exceptions to the Open Meetings Law are set forth in N.C. Gen. Stat. § 143-318.11 (2009), and this Court has held that

exceptions to the operation of open meetings laws must be narrowly construed. *See Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 586 (1976) (citations omitted) (“While neither our Supreme Court nor this Court has spoken on the question of strict construction as it pertains to our open meetings law, courts of other states have held that exceptions to their open meeting statutes allowing closed meetings must be narrowly construed since they derogate the general policy of open meetings.”).

Id. at 655-56, 566 S.E.2d at 704. But no exception to the Open Meetings Law is at issue in this case, and the phrases “open to the public” and “any person is entitled to attend such a meeting[.]” *see* N.C. Gen. Stat. § 143-318.10(a), are susceptible to different interpretations. “If a statute is unclear or ambiguous, however, courts must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress.” *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (citation omitted). In addition, other states which have addressed the issue have consistently held that the Open Meeting Laws, other than the exceptions, should be liberally construed “in favor of open meetings and full disclosure.” Schwing, *supra*, § 3.6. In sum, both the requirements for meetings of public bodies to be open and statutory exceptions to open meetings are construed in favor of public access.

We must therefore interpret these phrases in light of the legislative intent and “the evil the legislature intended the statute to suppress,” using a liberal interpretation which favors full and open access. *See Jackson*, 353 N.C. at 501, 546 S.E.2d at 574. We have some additional guidance from the Open Meeting Law statutes themselves. First, N.C. Gen. Stat. § 143-318.9 (2009), states that

Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people’s business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

Thus, the statement of North Carolina's policy that meetings be conducted "openly" gives only general guidance, as our question is whether a meeting is "open" if "any person" is excluded for any reason. *See* N.C. Gen. Stat. § 143-318.10. Yet considering the Open Meetings Law statutes as a whole, we see that the legislature did enumerate some of the "evils" which the legislature intended to suppress. N.C. Gen. Stat. § 143-318.16A provides that if the court has found a violation of the Open Meetings Law, it should consider the following factors in determining the appropriate remedy:

- (1) The extent to which the violation affected the substance of the challenged action;
- (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
- (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
- (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;
- (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
- (6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

Although these factors are applicable only where the trial court has already found a violation of N.C. Gen. Stat. § 143-318.16A, we believe that they are instructive as to the factors the General Assembly determined important in the court's consideration of the seriousness of a violation and whether the violation requires the court to take action to remedy the violation, which may include voiding any action taken at the illegal meeting. Based upon these factors, the legislature's purpose for N.C. Gen. Stat. § 143-318.10 is to ensure that public bodies receive public input regarding the substance of the public body's actions, that the public has the opportunity to have knowledge and understanding of the public body's deliberations and actions, and that public bodies to act in good faith in making provision for the public's knowledge and participation in its meetings.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

Therefore, we reject the plaintiffs' literal reading of N.C. Gen. Stat. § 143-318.10 as providing that the exclusion of "any person" because a meeting room of appropriate size is at capacity would cause a meeting not to be "open" as contemplated by the Open Meetings Law. We instead hold that the trial court used the correct legal standard in evaluating the actions of the defendants, as it concluded that "The Board is required by North Carolina General Statute § 143-318.9 *et. seq.* (the Open Meetings Law) to take reasonable measures to provide for public access to its meetings."

This standard of reasonableness of opportunity for public access to the meeting of a public body is consistent with the interpretation of the Open Meetings Laws of all other states which have considered the issue. Several other states have considered how to interpret similar statutory language, but no state has ever determined that *any* or *all* persons who wish to attend a meeting must be permitted to do so to be in compliance with the Open Meetings Law, where the meeting is held in a room of a reasonable size for the particular meeting. As noted above, the New Mexico Supreme Court in *Gutierrez* held that its open meetings statute "mean[t] only that the governmental entity must allow reasonable public access for those who wish to attend and listen to the proceedings." 96 N.M. at 401, 631 P.2d at 307. The *Gutierrez* court noted that many other states had also held that public meetings must be in substantial compliance with their open meetings laws:

Substantial compliance has occurred when the statute has been sufficiently followed so as to carry out the intent for which it was adopted and serve the purpose of the statute. *Smith v. State*, 364 So.2d 1 (Ala.Cr.App.1978). This doctrine has been applied to open meetings laws by the courts of several states. *See Karol v. Bd. of Ed. Trustees, Etc.*, [122 Ariz. 95, 593 P.2d 649, 651 (1979)]; *City of Flagstaff v. Bleeker*, 123 Ariz. 436, 600 P.2d 49 (Ct.App.1979); *Houman v. Mayor and Council, Etc.*, 155 N.J.Super. 129, 382 A.2d 413 (1977); *McConnell v. Alamo Heights Ind. Sch. Dist.*, 576 S.W.2d 470 (Tex.Civ.App.1978); *Toyah Ind. Sch. Dist. v. Pe-cos-Barstow Ind. Sch. Dist.*, 466 S.W.2d 377 (Tex.Civ.App.1971); *see also Edwards v. City Council of City of Seattle*, 3 Wash. App. 665, 479 P.2d 120 (1970).

Id.

The Arizona Supreme Court, in *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 593 P.2d 649 (1979) likewise rejected a literal interpreta-

tion of Arizona's open meetings law which provided that "All official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings," holding that "[t]he intent of the legislature was to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret A meeting held in the spirit of this enunciated policy is a valid meeting." *Id.* at 97 n.2, 593 P.2d at 651 n.2.

Therefore, to the extent that the Board permitted reasonable public access to the 23 March 2010 meetings, it substantially complied with N.C. Gen. Stat. § 143-318.10, and no Open Meetings Law violation has occurred. To the extent that defendants acted unreasonably as to public access to the 23 March 2010 meetings, it did violate the Open Meetings Law. The trial court was required to consider the reasonableness of the Board's actions as to the alleged violations of the Open Meetings Law, and the trial court did, in fact, make these factual determinations and conclusions of law. Plaintiffs have not argued in their brief that the trial court's findings of fact were not supported by the evidence. Thus, before we consider whether the findings of fact support the trial court's conclusions of law, we will turn to defendants' cross appeal, as defendants do challenge some findings of fact. We will then consider whether the findings of fact support the conclusions of law, as both plaintiffs and defendants argue, for different reasons, that some conclusions of law are in error.

V. Defendants' cross appeal

Defendants filed a notice of cross appeal as to certain findings of fact and conclusions of law. As noted above, defendants objected to the trial court's consideration of the case on its merits, but we have already determined that the order as entered by the trial court did not prejudice defendants as the outcome was favorable to defendants. Despite the trial court's denial of relief to plaintiffs, defendants argue that the following findings of fact are not supported by the evidence:

6. The measures involved the issuance of tickets to the Board meeting and limiting the public's attendance to those who had tickets, excluding the public from the room in which the COW met, and the provision of overflow space in which those who could not enter the meeting room could observe the meetings on live electronic audiovisual feeds.

7. Some of the plaintiffs were prevented or deterred from attending one or both of the meetings as a result of the measures.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

8. The ticketing procedures changed over the course of issuance without notice to the public.

....

10. One of the plaintiffs was denied accommodation for a disability at meetings on March 2.

Defendants also argue that the following conclusions of law were not supported by the findings of fact:

9. A ticketing procedure requiring a ticket holder to remain on the premises for hours preceding a meeting is unreasonable.

10. Complete exclusion of members of the public from meetings of the COW prior to the meetings is unreasonable.

11. Failing to make accommodations for members of the public who are disabled is unreasonable.

A. Challenged findings of fact

Although defendants argue that certain findings of fact are not supported by the evidence, the evidence of both parties is in substantial agreement as to what happened; the dispute is whether the Board's actions were reasonable. Defendants do not dispute that they adopted a policy on the morning of March 23 to issue tickets for the meetings; that the Board originally required ticketholders to stay on the premises but later eliminated this requirement; that notice of the change was given only to those persons on the premises and was not published on the Board's website; that some people were unable to attend the meetings for lack of sufficient space; or that plaintiff Garlock suffered from a medical condition which made it difficult for her to stand for long periods of time and she did not attend the 23 March 2010 meeting because of her prior experience of having to stand for a long time before getting a seat in the meeting room at the 2 March 2010 meeting. Thus, the real issue is whether the findings of fact support the conclusions of law, and this is an issue which we review *de novo*. *Knight*, 189 N.C. App. at 699-700, 659 S.E.2d at 746. We will consider both plaintiffs' and defendants' arguments as to the conclusions of law.

B. Challenged conclusions of law

We must now examine each of defendants' challenges to conclusions of law as to reasonableness of the Board's actions.

1. Ticketing procedure

The trial court concluded that a ticketing procedure requiring a ticket holder to remain on the premises for hours preceding a meeting was unreasonable. Although defendants make various arguments regarding the last-minute adoption of this policy and changes in its application during the day on 23 March 2010, as stated above, they do not actually contest the facts found by the trial court. In our *de novo* review of the trial court's conclusion of law, we hold that the trial court properly found that the ticketing procedure was unreasonable in the manner in which it was used on 23 March 2010. N.C. Gen. Stat. § 143-318.12(a) provides that if a public body has established a "schedule of regular meetings," it must keep this schedule on file, and if "a public body changes its schedule of regular meetings, it shall cause the revised schedule to be filed as provided in subdivisions (1) through (4) of this subsection at least seven calendar days before the day of the first meeting held pursuant to the revised schedule." N.C. Gen. Stat. § 143-318.12(b) provides that "If a public body holds an official meeting at any time or place other than a time or place shown on the schedule filed pursuant to subsection (a) of this section, it shall give public notice of the time and place of that meeting as provided in this subsection." One of the requirements of the notice in the change of "time or place" of an official meeting is that the "notice shall be posted and mailed, e-mailed, or delivered at least 48 hours before the time of the meeting." N.C. Gen. Stat. § 143-318.12(b)(2). But notice of the location and time of the meeting is worthless if a person planning to attend a meeting is not also informed that a ticket will be required. Without notice of the ticketing requirement, a member of the public may show up at the announced time and location for the meeting, only to be denied admission for lack of a ticket. Thus, under N.C. Gen. Stat. § 143-318.12, a public body's meeting notice must include any information reasonably necessary to give members of the public the opportunity to attend the meeting, if information beyond the time and location is necessary, as it was here. Thus, a ticketing procedure with proper advance notice may be reasonable, as also found by the trial court.

2. Complete exclusion of members of the public from the COW meetings

Defendants again do not dispute that there was no seating available for members of the public for at least the portion of the COW meeting addressing the budget, as all seats were filled by staff members; only after some staff members left were members of the public permitted

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

to enter. The parties also agree that there was media coverage of the entire COW meeting. Yet media coverage alone does not render a meeting open; a reasonable opportunity for access by members of the public must be made. The complete exclusion of members of the public from the COW meeting for a significant portion of the meeting is the most obvious violation of the Open Meetings Law in this case. The trial court found the Board's rationale of convenience of holding the COW meeting in a smaller room to be unreasonable under the circumstances, and we agree, particularly as there was a larger room immediately available *in the same building*, so that a last-minute change in the location of the COW meeting would not violate the statutory notice requirements as to the location of the meeting. *See* N.C. Gen. Stat. § 143-318.12. The convenience of the members of the COW and staff was not a sufficient reason to deny public access. *See Canney v. Board of Public Instruction of Alachua County*, 278 So.2d 260, 264 (Fla. 1973) ("Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute. The benefit to the public far outweighs the inconvenience of the board or agency.")

3. Failure to make accommodations for a disabled member of the public

The trial court's conclusion regarding a lack of reasonable accommodation of a disabled person is distinct from the others which defendants challenge. Plaintiffs presented evidence that plaintiff Garlock suffers from metastatic stage four cancer and that she was unable to stand for a long period of time. In her affidavit, plaintiff Garlock explained that at a prior Board meeting on 2 March 2010, she stood in the hall outside the Board meeting room for about an hour. She explained her medical situation to a security guard and asked to sit in one of several empty chairs in the room, but he told her to wait until a break in the meeting to see if any seats were available. Although she was eventually able to get a seat in the meeting room, her experience caused her to believe that she could not safely attend future meetings because of the lack of adequate accommodations for her disability. This evidence supports the trial court's finding of fact No. 10, although the finding does not identify the disabled party or the nature of the disability. It is obvious from the record that the finding must be based upon plaintiff Garlock, as she was the only person alleged to be disabled and the only plaintiff who made assertions regarding lack of accommodation of disability.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

The Open Meetings Law does not include any provision regarding accommodation at public meetings of a disabled member of the public as opposed to a non-disabled member of the public. For purposes of the Open Meetings Law, all members of the public are treated the same. *See* N.C. Gen. Stat. § 143-318.10. If we were to accept plaintiffs' argument that a disabled person's need to sit must be accommodated by giving that person a seat in preference to a non-disabled person who also wants to attend the meeting, this would change the "first come, first served" nature of access to public meetings to a rule which favors members of the public who claim to have a superior right to attend the meeting for some reason not addressed by the Open Meetings Law. Where a meeting room is filled to capacity, giving a seat to one person necessarily means that another person who is also standing in the hall and who also wants to attend the meeting will not be allowed to sit.

Certainly, a public body may provide specially modified seating areas to accommodate disabled members of the public; this type of accommodation may well be required by other state and federal laws, but that is not the claim presented by plaintiffs in this case. There are other potentially applicable state and federal statutes which govern access to public facilities by disabled persons, but those statutes are not at issue here. *See* the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* and the Persons with Disabilities Protection Act, N.C. Gen. Stat. § 168A-1, *et seq.* The factual allegations of plaintiffs' complaint appear to be alluding to N.C. Gen. Stat. § 168A-1, *et seq.*, the Persons with Disabilities Protection Act. Even if we assume that plaintiffs were basing their claim in part upon Chapter 168A or that Chapter 168A is potentially applicable to the Board and COW meetings as alleged by plaintiffs, we note that plaintiffs did not make allegations or present evidence sufficient to state a claim under Chapter 168A. For example, N.C. Gen. Stat. § 168A-4(a) (2009) states that "reasonable accommodation duties" do not arise until a

qualified person with a disability requesting a reasonable accommodation . . . apprise[s] the employer, employment agency, labor organization, or place of public accommodation of his or her disabling condition, submit[s] any necessary medical documentation, make[s] suggestions for such possible accommodations as are known to such person with a disability, and cooperate[s] in any ensuing discussion and evaluation aimed at determining possible or feasible accommodations.

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

There is no allegation or evidence that after her experience at the 2 March 2010 meeting plaintiff Garlock submitted any medical documentation to defendants, made suggestions for accommodations, or cooperated in any “ensuing discussion and evaluation” regarding accommodations. *See id.* She asked to sit in a chair in the board meeting room; a chair was not immediately available, at least in the board meeting room; and she later obtained a seat in the meeting room. Her alleged medical need was for a place to sit, but she claims that “reasonable accommodation” entitles her to a seat *only* in the meeting room, not somewhere else in the Board’s building, even though all of the seats in the meeting room were filled by other members of the public who had an equal right to attend the meeting. Although we have great sympathy for plaintiff Garlock’s situation, her medical condition is simply not relevant to the determination of whether an Open Meetings Law violation occurred. We therefore find that the trial court committed an error of law as to Conclusion of Law No. 11, as there was no legal difference between plaintiff Garlock and the other plaintiffs, or any other member of the public, for purposes of the Open Meetings Law. The trial court’s conclusion of law that “[f]ailing to make accommodations for members of the public who are disabled is unreasonable” in this situation is tantamount to a conclusion that not permitting every member of the public who wanted to have a seat in the Board meeting room to sit there was unreasonable and thus a violation of the Open Meetings Law. This is not the standard required by N.C. Gen. Stat. § 143-318.10. We therefore vacate conclusion of law No. 11 as it is inconsistent with the requirements of N.C. Gen. Stat. § 143-318.10. *See News & Observer Pub. Co. v. Interim Bd. of Ed. for Wake County*, 29 N.C. App. 37, 51, 223 S.E.2d 580, 589 (1976) (Affirming the order while vacating provisions of the order which were not supported by requirements of statute, noting that “[n]either party has cited, and our research fails to disclose, any statute that specifically provides for notice of a special meeting.”)

VI. Remedy

As we have affirmed the trial court’s conclusions of law as to violations of the Open Meetings Law in the ticketing policy as practiced on 23 March 2010 and the exclusion of the public from the COW meeting, we must now consider whether the trial court abused its discretion by its denial of affirmative relief to the plaintiffs. *See Dockside Discotheque, Inc.*, 115 N.C. App. at 307, 444 S.E.2d at 453. Plaintiffs argue that even though the trial court found that defendants’ actions as to the ticketing policy as practiced on 23 March 2010 and the exclu-

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

sion of the public from the COW meeting were unreasonable and therefore in violation of the Open Meetings Law, the trial court erred by not clearly stating that these were violations of the Open Meetings Law or granting other relief.

Plaintiffs note that

[a] judicial determination that a public body has violated the Open Meetings Law requires a separate analysis and standard from the determination of the appropriate remedies. This Court has upheld or recognized violations of the Open Meetings Law while also ruling that the prevailing appellants were not entitled to a declaration that the actions taken by the liable defendant governing body should be invalidated.

We agree that this distinction is not clearly made in the trial court's order but find no abuse of discretion as to the trial court's denial of affirmative relief.

The Open Meetings Law requires a two-step analysis. First, the trial court must consider whether a violation of the Open Meetings Law has occurred; that is, whether the public body has taken reasonable measures to provide for public access to its meetings. If no violation has occurred, the analysis stops at step one. If there was a violation, the court must consider step two, which is identifying the appropriate remedy. The trial court may consider remedies under N.C. Gen. Stat. § 143-318.16, which governs injunctive relief, and N.C. Gen. Stat. § 143-318.16A, which provides for "Additional remedies for violations of Article." N.C. Gen. Stat. § 143-318.16A provides as follows in pertinent part:

(a) Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large. The public body whose action the suit seeks to set aside shall be made a party. The court may order other persons be made parties if they have or claim any right, title, or interest that would be directly affected by a declaratory judgment voiding the action that the suit seeks to set aside.

. . . .

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

(c) In making the determination whether to declare the challenged action null and void, the court shall consider the following and any other relevant factors:

(1) The extent to which the violation affected the substance of the challenged action;

(2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;

(3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;

(4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;

(5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;

(6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

(d) A declaratory judgment pursuant to this section may be entered as an alternative to, or in combination with, an injunction entered pursuant to G.S. 143-318.16. . . .

It is apparent from the trial court's order that in step one, it found three violations of the Open Meetings Law: the ticketing procedure as practiced on 23 March 2010; exclusion of the public from the COW meeting; and failure to accommodate a disabled person. As discussed above, the trial court erred as to the third violation, as disability is not a consideration under the Open Meetings Law, but the trial court properly found violations as to the ticketing procedure and exclusion of the public from the COW meeting. The trial court then noted its conclusions as to each of the relevant factors under N.C. Gen. Stat. § 143-318.16A in determining what action to take in regard to the violations. Specifically, the trial court stated that⁵:

5. For ease in comparison of the trial court's conclusions to the factors listed in N.C. Gen. Stat. § 143-318.16A, we have quoted the conclusions in the same order as the corresponding subsections in the statute as quoted above. The trial court addressed each subsection except (c)(5), which was not applicable here as there were "no persons [who] relied upon the validity of the challenged action" so the trial court could

GARLOCK v. WAKE CNTY. BD. OF EDUC.

[211 N.C. App. 200 (2011)]

13. The Court cannot conclude on this record that any alleged violation of the Open Meetings Law affected the substance of any action of the Board.

....

16. The Board makes reasonable efforts to conduct its business in the open and in view of the public.

17. Meetings of the Board and the COW are open to the public as contemplated by the Open Meetings Law.

....

14. The Court cannot conclude on this record that any alleged violation of the Open Meetings Law prevented or impaired public knowledge or understanding of the people's business.

....

18. The Board is taking reasonable action to implement measures to address alleged past violations of the Open Meetings Law.

....

12. The Court cannot conclude on this record that the Board engages in continuous violations of the Open Meetings Law or that past violations, if any, will reoccur.

....

15. The Court cannot conclude on this record that any alleged violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in the Open Meetings Law.

The trial court addressed each of the applicable factors under N.C. Gen. Stat. § 143-318.16A and found no basis for invalidation of the Board's actions or any other affirmative relief, so the trial court ordered none. Essentially, the trial court found that the violations happened only on 23 March 2010, that they did not affect the substance of the Board's actions, that they were not committed in bad faith, and that the Board had in the past made and was continuing to make reasonable efforts to comply with the Open Meetings Law. For these reasons, despite the fact that violations had occurred, the trial court determined that no affirmative relief was warranted. This determination was based upon consideration of the statutory factors and thus was a proper exercise of the trial court's discretion.

not consider "the effect on such persons of declaring the challenged action void." N.C. Gen. Stat. § 143-318.16A.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

Plaintiffs argue that there is a need for a declaration by the court that a violation occurred, even if no relief is granted, so that defendants will not repeat the violations in the future. We agree, but we also find that the trial court did just that. Plaintiffs may have wished for the order to be worded differently, but the determinations were made and there is no need to remand the order to the trial court to restate its findings or conclusions more artfully. In fact, we have fully considered these findings and conclusions as to the violations and we have affirmed the trial court's conclusions of law as to two violations of the Open Meetings Law. The trial court did not abuse its discretion in denying additional relief.

VII. Conclusion

For the reasons stated above, we affirm the order of the trial court except in the following respect:

Conclusion of law No. 11 ("Failing to make accommodations for members of the public who are disabled is unreasonable.") is vacated.

We therefore affirm the trial court's order except as modified.

MODIFIED AND AFFIRMED.

Judges HUNTER, Robert C. and ERVIN concur.

WENDY SHACKLETON, AS THE EXECUTRIX OF THE ESTATE OF BRENDA P. GAINNEY,
DECEASED, AND AS THE EXECUTRIX OF THE ESTATE OF LEWARD BENMACK GAINNEY,
DECEASED EMPLOYEE PLAINTIFF V. SOUTHERN FLOORING & ACOUSTICAL
COMPANY, EMPLOYER, AND USF&G KEMPER INSURANCE COMPANY, CARRIER,
DEFENDANTS

No. COA10-734

(Filed 19 April 2011)

**1. Workers' Compensation— death—not significantly caused
by asbestosis—findings and conclusions**

The Industrial Commission did not err by concluding that decedent's asbestosis neither caused nor significantly contributed to decedent's death. A doctor's testimony supported the Commission's findings, and in turn its conclusion, that asbestosis did not significantly contribute to decedent's death.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

2. Workers' Compensation—attendant care—reasonable and medically necessary—misapprehension of law—matter remanded

The Industrial Commission erred by concluding there was insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of decedent's compensable asbestosis. The Commission's requirement that a physician's prescription was a prerequisite to attendant care compensation constituted a misapprehension of law. The matter was remanded for a new determination using the correct legal standard.

Appeal by Plaintiff from Opinion and Award of the Full North Carolina Industrial Commission entered 22 March 2010 by Commissioner Christopher Scott. Heard in the Court of Appeals 10 January 2011.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton, Tracy L. Jones, and Leslie B. Price, for Defendants-Appellees.

THIGPEN, Judge.

The Industrial Commission concluded Decedent's death was not caused by asbestosis and that since the attendant care of Decedent was not prescribed by a doctor, it was not compensable. We must decide whether the conclusions of law of the Industrial Commission were supported by the findings of fact, and the findings of fact, in turn, supported by the evidence. We affirm the decision of the Industrial Commission on the issue of death benefits. We remand on the issue of compensation for attendant care.

The record and procedural history of this case show the following: Leward Benmack Gainey ("Decedent") was employed by Southern Flooring & Acoustical ("Defendant") from 1969 to 1983. Decedent began his work for Defendant as a field installer, a job which primarily involved the installation of asbestos tiles in ceilings. On 8 April 1999, Decedent filed a Form 18B with the Industrial Commission, seeking benefits for his occupational disease resulting from exposure to asbestos during his employment with Defendant. On 2 September 2003, the Full Commission entered an Opinion and Award concluding

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

that “[Decedent] was last injuriously exposed to asbestos during his employment with Southern Flooring and that [Decedent] had contracted asbestosis as a result of that exposure.” *Estate of Gainney v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 500, 646 S.E.2d 604, 606 (2007). The Commission, however, “remanded the matter to a deputy commissioner for immediate hearing and Opinion and Award regarding the disability of [Decedent] as a result of his asbestosis.” *Id.*, 184 N.C. App. at 500, 646 S.E.2d at 606. A deputy commissioner entered an opinion and award concluding that Decedent was totally and permanently disabled, and his asbestosis was a significant contributing factor in the disability. The Full Commission entered an Opinion and Award on 2 March 2006,¹ summarized by this Court in *Gainney*, 184 N.C. App. 497, 646 S.E.2d 604:

[T]he Commission found that (1) [Decedent] had received medical treatment for asbestosis-related problems; (2) [Decedent] suffered from breathing problems as a result of asbestosis; (3) [Decedent] had suffered from asbestosis as a result of his employment with defendant-employer and the disease had rendered him unable to perform gainful employment since 3 December 1999; (4) [Decedent]’s breathing problems severely impaired his daily activities; (5) as a result of asbestosis, it was difficult, if not impossible, for [Decedent] to do any job that required any amount of physical activity; and (6) [Decedent] stopped working in 1995 as a result of his disease and [Decedent]’s asbestos-related condition continued to deteriorate until his death. The Commission concluded that as a result of his asbestosis, [Decedent] was entitled to permanent and total disability compensation at the weekly rate of \$481.24 from 3 December 1999, the date of the panel examination by Dr. Rostand, through the date of his death, 9 May 2005. Defendants were ordered to pay the compensation awarded to [Decedent]’s estate in a lump sum, along with attorney’s fees in the amount of 25% of the compensation awarded.

1. Decedent died on 9 May 2005, before the entry of the Full Commission’s Opinion and Award regarding his disability. On 22 July 2005, Brenda Gainney, the executrix of Decedent’s estate at that time, filed an amended Form 18B seeking benefits for Decedent’s death. Brenda Gainney also died before the completion of the appeals process with regard to benefits stemming from Decedent’s death, and Wendy Shackleton (Plaintiff), the daughter of Brenda Gainney and Decedent, qualified as the executrix of both the estates of Brenda Gainney and Decedent. Plaintiff subsequently filed a Form 33 seeking death benefits and a separate Form 33 on the issue of attendant care.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

Id., 184 N.C. App. at 500-01, 646 S.E.2d at 606-07.

On 3 July 2007, this Court affirmed the 2 March 2006 Opinion and Award of the Industrial Commission awarding Decedent permanent and total disability compensation at the weekly rate of \$481.24 from 3 December 1999 until the date of his death. *See id.*, 184 N.C. App. at 500-04, 646 S.E.2d at 606-09.

In response to Plaintiff's Form 33 seeking benefits for Decedent's death, Deputy Commissioner Robert J. Harris entered an Opinion and Award on 6 December 2007 concluding that Decedent's asbestosis neither caused nor significantly contributed to Decedent's death. Deputy Commissioner Myra L. Griffen entered an Opinion and Award on 26 June 2008 in response to Plaintiff's Form 33 seeking attendant care benefits, concluding that there was "insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of [Decedent]'s compensable asbestosis" and that Decedent's "claim for attendant care services is DENIED."

On 22 March 2010, the Full Commission entered an order affirming both orders from the Deputy Commissioners, denying Decedent's claim for compensation for death pursuant to N.C. Gen. Stat. § 97-38, and denying Decedent's claim for attendant care benefits pursuant to N.C. Gen. Stat. § 97-2(19) (2009), and N.C. Gen. Stat. § 97-25 (2009). From this Opinion and Award, Plaintiff appeals, challenging the adequacy of the evidence to support the Full Commission's findings of fact with regard to both issues: compensation for death and attendant care benefits.

Standard of Review:

In reviewing a decision by the Industrial Commission, our Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991) (citation omitted). "The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding." *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738, 661 S.E.2d 745, 748 (2008), *disc. review denied*, 363 N.C. 128, 675 S.E.2d 367 (2009) (citation omitted). On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[;] [t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998),

IN RE ESTATE OF GAINEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

reh'g denied, 350 N.C. 108, 532 S.E.2d 522 (1999) (quotation omitted). “The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Id.*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). “[F]indings of fact by the Commission may [only] be set aside on appeal when there is a complete lack of competent evidence to support them[.]” *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted).

“The Commission’s conclusions of law are reviewed *de novo*.” *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

I: Death from Occupational Disease

[1] In Plaintiff’s first argument on appeal, she contends the Commission erred by concluding Decedent’s asbestosis neither caused nor significantly contributed to Decedent’s death.² Specifically, Plaintiff argues the Commission erred because “asbestosis was clearly a causative factor in the death of Decedent.”

“For an injury or death to be compensable under our Workmen’s Compensation Act it must be either the result of an accident arising out of and in the course of the employment or an occupational disease.” *Booker v. Duke Medical Center*, 297 N.C. 458, 465, 256 S.E.2d 189, 194 (1979) (quotations omitted). Death benefits under the Workers’ Compensation Act are governed by N.C. Gen. Stat. § 97-38, which states the following:

If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than

2. The parties agree the Commission has in prior orders determined that Decedent’s asbestosis arose out of his employment; Decedent’s asbestosis was a compensable occupational disease; Decedent was totally and permanently disabled, and his asbestosis was a significant contributing factor in his disability. The sole question on appeal with regard to Plaintiff’s first argument is whether the Commission erred by concluding that Decedent’s asbestosis neither caused nor significantly contributed to Decedent’s death.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

thirty dollars (\$30.00), per week, and burial expenses not exceeding three thousand five hundred dollars (\$3,500)[.]

N.C. Gen. Stat. § 97-38.

In asbestosis cases, the question of whether a decedent receives death benefits pursuant to N.C. Gen. Stat. § 97-38 depends upon whether “[the decedent’s compensable] asbestosis either caused or significantly contributed to his . . . death[.]” *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 509, 616 S.E.2d 356, 365 (2005).

The question of whether Decedent’s occupational disease caused or significantly contributed to Decedent’s death was determined in this case through the testimony of expert witnesses. “In cases involving complicated medical questions, only an expert can give competent opinion testimony as to the issue of causation.” *Kelly*, 190 N.C. App. at 739, 661 S.E.2d at 748 (citing *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). “Where, as here, medical opinion testimony is required, ‘medical certainty is not required, [but] an expert’s speculation is insufficient to establish causation.’ ” *Kelly*, 190 N.C. App. at 739, 661 S.E.2d at 748 (quoting *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003)). The Supreme Court has stated that “ ‘[t]he evidence must be such as to take the case out of the realm of conjecture and remote possibility[.]’ ” *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (2003) (citing *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). “We acknowledge that the ‘mere possibility of causation,’ as opposed to the ‘probability’ of causation, is insufficient to support a finding of compensability.” *Whitfield v. Lab. Corp.*, 158 N.C. App. 341, 351, 581 S.E.2d 778, 785 (2003) (quoting *Swink v. Cone Mills, Inc.*, 65 N.C. App. 397, 398, 309 S.E.2d 271, 272 (1983)).

In the case *sub judice*, the Commission found as fact the following:

1. As of the date of his death, May 9, 2005, Decedent-Employee was 70 years old. Decedent-Employee was employed by defendant-employer, Southern Flooring and Acoustical Company from 1969 to 1983. The Commission previously found that decedent-employee contracted severe and disabling asbestosis from his employment with defendant-employer.
2. Decedent-Employee was also diagnosed with cirrhosis of the liver as a result of Hepatitis, which is not related to his employment.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

. . . .

4. Decedent-Employee's death certificate identified cirrhosis as the "immediate cause" of death and listed hepatitis-B, asbestosis and COPD as conditions "leading to immediate cause[.]"
5. In the months immediately preceding Decedent-Employee's death, his cirrhosis of the liver rapidly worsened. During 2005, Decedent-Employee had end-stage liver disease, his condition being at Stage 4, or the worst stage of the disease, with greater than 90 percent loss of liver function.

. . . .

8. Although the May 3, 2005 discharge summary did reference the asbestosis, the summary did not describe any resulting effect of the asbestosis on Decedent-Employee's overall health. Instead, at that time, the focus of the medical treatment appears to have been on the cirrhosis of the liver and the complications resulting therefrom, and on reducing Decedent-Employee's discomfort during his final illness. The summary also noted that Decedent-Employee had been referred for hospice services two days before his May 1, 2005 hospital admission.
9. . . . [T]he record from May 3, 2005, just prior to Decedent-Employee's death, did not make any mention of any lingering upper respiratory illness or complication from asbestosis.
10. On March 7, 2005, the results of a CT scan without contrast of the chest indicated stable lung findings compared to a test done the year before. However, the results also indicated increasing abdominal ascites, which is fluid build-up in the abdomen due to a failing liver.
11. Dr. Clements is a board-certified gastroenterologist who began seeing Decedent-Employee for his hepatitis-B in December of 2000 and treated Decedent-Employee through his final clinic visit on April 5, 2005, at which time Decedent-Employee was "very ill." Dr. Clements signed the death certificate. As he testified, Decedent-Employee's liver condition was the primary cause of his death.
12. As Dr. Clements further testified, while asbestosis was a portion of Decedent-Employee's general demise over time, the

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

acute demise at the end was due to the progression of the liver disease. As Dr. Clements further testified, Decedent-Employee did not have a big pulmonary demise at the end. While asbestosis was, in Dr. Clements' estimation, "one of the portions that were involved with (Decedent-Employee's) death," Dr. Clements found it "hard, really, to differentiate" the contribution of asbestosis to Decedent-Employee's overall condition at his death.

13. Dr. Clements testified that he would yield to a pulmonologist as to the overall contribution that asbestosis had in Decedent-Employee's death.
14. Dr. Alford, a board-certified pulmonologist to whom Decedent-Employee was referred by his primary care physician, saw Decedent-Employee just twice before his death. As Dr. Alford testified, the asbestosis caused *cor pulmonale*, or right heart failure, in Decedent-Employee, which can lead to death.
15. As of Decedent-Employee's second visit to Dr. Alford, on February 14, 2005, his pulmonary symptoms had improved somewhat from the month before. Decedent-Employee had reduced his Bumex doses and was using oxygen only intermittently, and his *cor pulmonale* was not as dominant or debilitating as it had been at the previous visit.
16. Dr. Alford did not know the details of Decedent-Employee's death, and he was unaware that Decedent-Employee had end-stage cirrhosis, which by itself can cause death. While Dr. Alford testified that he "would not be surprised to know that asbesto[sis] . . . and right heart failure, more specifically, was a definite factor in (Decedent-Employee's) death," he also acknowledged that he did not have enough details from the death certificate to know exactly how Decedent-Employee died.
17. Dr. Surdulescu, a board-certified pulmonologist to whom Decedent-Employee was referred by his counsel, in December of 2004 stated that he could not comment on the cause of Decedent-Employee's death. When asked directly whether asbestosis had contributed to Decedent-Employee's death, Dr. Surdulescu testified, "It's hard to tell—asbestosis, in conjunction with some other problems, maybe." Dr. Surdulescu further testified that the inclusion of asbestosis on the death certificate was not "surprising" to him.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

18. Dr. Vorwald, a board-certified family physician who was Decedent-Employee's primary physician, last saw Decedent-Employee on February 4, 2005. He did not treat Decedent-Employee during the three-month period prior to his death and did not review Decedent-Employee's medical records for that period. Although Dr. Vorwald testified that asbestosis was a significant contributing factor in Decedent-Employee's death, he had a limited basis for offering an opinion as to the cause of death. In fact, Dr. Vorwald testified that the physicians who were treating Decedent-Employee near the time of his death were in a better position to determine the factors that were significant in Decedent-Employee's death.
19. Based upon a careful review of the medical evidence of record, the Full Commission assigns greater weight to the testimony of Dr. Clements than to that of Dr. Vorwald, because Dr. Clements specializes in the field of abdominal disorders and treated Decedent-Employee much closer to his death than did Dr. Vorwald. The Full Commission also finds the testimony of Drs. Vorwald, Alford and Surdulescu regarding the contribution of asbestosis to Decedent-Employee's death to have been speculative, particularly the testimony to the effect that the witnesses would not have been "surprised" if it was a significant contributor. Dr. Clements yielded to a pulmonologist on the question of the level of contribution of the asbestosis to Decedent-Employee's death, but neither pulmonologist effectively testified that asbestosis was a significant contributing factor in Decedent-Employee's death. Finally, the Full Commission notes that Dr. Benson, who was apparently the last physician to examine Decedent-Employee while he was alive, was not deposed.

Based on the foregoing findings of fact, the Commission concluded the following, and rendered the Award accordingly:

1. Plaintiff has not carried its burden to show that Decedent-Employee's death proximately resulted from his compensable asbestosis. The findings do not support a conclusion that asbestosis was more likely than not a significant contributing factor in Decedent-Employee's death or that asbestosis more likely than not accelerated Decedent-Employee's death. As such, Plaintiff's claim for compensation for death under N.C. Gen. Stat. §97-38 must fail.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

. . . .

1. Plaintiffs claim for compensation for death under N.C. Gen. Stat. § 97-38 must under the law be, and is hereby, DENIED.

Dr. Clements gave the following testimony, which we must review to determine whether “[t]he Commission’s findings of fact are . . . supported by competent evidence[.]” *Kelly*, 190 N.C. App. at 738, 661 S.E.2d at 748. If the findings of fact are supported by competent evidence, they are conclusive upon appeal, “even if there is evidence to support a contrary finding.” *Id.*

Q: Do you have an opinion as to whether his respiratory—his pulmonary problems were contributing to that overall disability?

A: I would have to say that he did have lung—that’s not my area of expertise, but he did have some pulmonary—you know, pulmonary disease related as well. So I cannot say that it did not, but his main symptoms . . . were confusion. He did have some shortness of breath, but he had his belly full of fluid as well. So, yeah it’s kind of hard to differentiate when you are having some shortness of breath symptoms and confused. But I would—I would say that it at least played some part in his—in his disease state.

. . . .

Q: Okay. As we sit here today, does it remain your opinion that asbestosis was a causative factor in Mr. Gainey’s death?

A: I think it was one of the portions that were involved with his—with his death.

Q: Okay. And, when you—and this may be an impossible question to answer. But, when you say “one of the portions,” how do you mean that?

A: Well, I think that he had—you know, when you have advanced liver disease and confusion, and we’re bringing back therapy and shortness of breath, and he had so many other items going on at the same time, it’s really—you know, it’s a big global picture, and there’s all the different pieces. And what pieces is prominent at the end of life, when he’s advanced, and you’re withdrawing therapy and things, it’s hard to—it’s hard, really, to differentiate between those two completely.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

. . . .

Q: And as far as the—as far as the cause of death itself, would you say the liver failure was the—was the primary cause of death?

A: Yes, I would.

. . . .

Q: And I'm not really looking for a percentage, but I'm just trying to get some kind of feel for whether or not you feel like the asbestosis was, you know, a significant contributing factor.

A: I think it was—I shouldn't say—I'm using too many words. I think it was a portion of his general demise over time. I think it was a portion of his general demise. And, when you have an organ system that's not working, it puts more stress on other systems that are involved with, you know, hepatitis. And so overall I think it was involved. The acute demise at the end, I don't think he had a big pulmonary demise. I think it was more progression of the liver disease.

. . . .

Q: Doctor, in terms of the extent of Mr. Gainney's shortness of breath, the cause of it and how severe the asbestosis was and its overall contribution to Mr. Gainney's death, would you yield to a pulmonologist?

A: Yes, 100 percent. . . .

As the Full Commission found as fact, Dr. Clements testified that Decedent's liver condition was the primary cause of Decedent's death; specifically Dr. Clements said "the acute demise at the end" was due to the "progression of the liver disease." Dr. Clements further described Decedent's asbestosis in the following manner: asbestosis was "some part in his . . . disease state"; "one of the portions that were involved with his . . . death"; "a portion of his general demise over time"; and "I don't think he had a big pulmonary demise" at the end of Decedent's life, but asbestosis was "involved." We believe that Dr. Clements' testimony certainly supports and tends to show that asbestosis was a factor in Decedent's death, but the question before the Full Commission was whether "asbestosis either caused or significantly contributed to [Decedent's] . . . death[.]" *Payne*, 172 N.C. App. at 509, 616 S.E.2d at 365. We believe Dr. Clements' testimony supports the Commission's findings, and in turn

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

it's conclusion, that asbestosis did not significantly contribute to Decedent's death. Dr. Clements' testimony provides competent evidence to support the challenged findings, and therefore, the findings of fact are conclusive on appeal. Although there was arguably evidence of record contrary to Dr. Clements' testimony, in the form of testimony by other physicians, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (citation omitted). The Commission did not err by giving more weight to the testimony of Dr. Clements than to the testimony of other physicians; nor did the Commission err by concluding that evidence in the form of testimony that a physician "would not be surprised to know that asbesto[sis]" contributed to Decedent's death was speculative. On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[;] [t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (1998) (citation omitted). As such, we conclude that the challenged findings of fact are supported by Dr. Clements' testimony, and the findings of fact, in turn, support the conclusion of law that Decedent's asbestosis did not cause or significantly contribute to Decedent's death. Therefore, we affirm the Full Commission's conclusion that Decedent's death is not compensable pursuant to N.C. Gen. Stat. § 97-38.

II: Attendant Care Compensation

[2] In Plaintiff's second and final argument on appeal, she contends the Full Commission erred by concluding there was "insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of Decedent-Employee's compensable asbestosis." We conclude the Commission acted under a misapprehension of law.

"Whether a plaintiff does or does not receive attendant care benefits is a conclusion of law which must be supported by findings of fact." *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 679, 559 S.E.2d 249, 252, *disc. review denied*, 356 N.C. 166, 568 S.E.2d 610 (2002). "On an appeal from an opinion and award from the Commission [regarding attendant care benefits], the standard of review for this Court 'is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law.'" *Id.*, 148 N.C. App. at 679-80, 559 S.E.2d at 252-53 (quoting *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000)).

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

“The Commission’s conclusions of law are reviewed *de novo*.” *McRae*, 358 N.C. at 496, 597 S.E.2d at 701. “If the conclusions of the Commission are based upon a . . . misapprehension of the law, the case should be remanded so ‘that the evidence [may] be considered in its true legal light.’” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006), *rehearing denied*, 361 N.C. 227, 641 S.E.2d 801 (2007) (quoting *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005)).

N.C. Gen. Stat. § 97-25 provides that “[m]edical compensation shall be provided by the employer.” N.C. Gen. Stat. § 97-2(19) defines the term “medical compensation”:

The term “medical compensation” means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and *other treatment*, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19) (Emphasis added).

In the case *sub judice*, the Commission made the following findings of fact with regard to the issue of whether Decedent was entitled to receive attendant care benefits:

20. From November 2004 through January 2005, decedent-employee was unable to do some of the things that he normally would perform on his own. As a result, his wife, Brenda Gainey, began assisting decedent-employee around the house for approximately 6 hours per day. From January 2005 to March 2005, decedent-employee’s wife and daughter, Wendy Shackleton, increased their assistance to 10 hours per day.
21. In March 2005, decedent-employee’s health began to deteriorate significantly. In April 2005, Brenda Gainey hired an individual named Judy Norris to assist in taking care of Decedent-Employee. Ms. Norris spent approximately 18 hours per day tending to decedent-employee’s needs. Ms. Norris’ qualifications and the amount of money paid for her services are unknown.

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

22. From March 2005 until his death, decedent-employee's family, with the assistance of Ms. Norris and Hospice, provided 24-hour supervision and care.
23. On February 4, 2005, Dr. Frederick Vorwald examined decedent-employee. At the time of the examination, Dr. Vorwald noted that that decedent-employee rarely left the house, but that he appeared capable of dressing and showering himself.
24. In February 2005, Dr. Alford examined decedent-employee for the last time prior to his death. Dr. Alford, who specializes in pulmonary and critical care medicine, noted that decedent-employee was clinically doing somewhat better. . . . Dr. Alford did not prescribe attendant care for decedent-employee, nor did he testify that attendant care was necessary due to the progression of decedent-employee's asbestosis.
25. On April 5, 2005, Dr. John Clements, who was treating decedent-employee for his end-stage [li]ver disease, provided his last treatment for decedent-employee. At that time, decedent-employee was suffering from ascites and was in a state of confusion, which made him incapable of tending to his own needs. The confusion was a result of elevated ammonia building up due to the advanced stage of his liver disease. Dr. Clement[s] was unable to attribute asbestosis as the cause of decedent-employee's incapacity. In Dr. Clement[s'] opinion, decedent-employee's confusion was paramount in his incapacity and that his mental state was a result of his liver failure.
26. Decedent-Employee's treating pulmonologist, Dr. Sever Surdulescu, last examined him in December 2004. At that time, decedent-employee exhibited a lack of energy to walk. Dr. Surdulescu stated that the cause of the lack of energy could be either his asbestosis or his cirrhosis or a combination of the two serious diseases. When questioned whether it was reasonable that decedent-employee would need help around the house in 2005, Dr. Surdulescu, the treating pulmonologist, responded "[i]t's possible, but I don't remember."
27. The greater weight of the competent medical evidence *fails to establish that any physician prescribed attendant medical care for Decedent-Employee*. The greater weight of the competent medical evidence also fails to establish that Decedent-Employee's incapacity to care for himself was the result of his compensable asbestosis. (Emphasis added).

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

Based on these findings of fact, the Full Commission made the following conclusion of law and entered the following award:

2. An injured employee is entitled to receive reasonable and necessary medical services and other treatment as may reasonably be required to effect a cure or give relief. N.C. Gen. Stat. §§ 97-2(19), 97-25. Attendant care services can be compensable under the Act if the treatment provided is reasonable and necessary. In determining whether the attendant care is reasonable and necessary, the *competent medical evidence must show that a physician has prescribed attendant care as a necessary result of the accident. The physician must also describe with a reasonable degree of particularity the nature and extent of the duties to be performed as attendant care. Leathers v. City Coach Lines, Inc.*, I.C. File Number 972686, Full Commission Opinion and Award filed March 18, 2002. There is insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of Decedent-Employee's compensable asbestosis. Plaintiffs claim for attendant care should be denied. N.C. Gen. Stat. §§ 97-2(19); 97-25. (Emphasis added).

....

2. Plaintiffs claim for attendant care services must under the law be, and is hereby, DENIED.

The Full Commission cites only *Leathers v. City Coach Line Inc.*, I.C. File Number 972686, which is a Full Commission Opinion & Award filed 18 March 2002, for the legal proposition that "competent medical evidence must show that a physician has prescribed attendant care as a necessary result of the accident[;] [t]he physician must also describe with a reasonable degree of particularity the nature and extent of the duties to be performed as attendant care." Defendants argue on appeal that a treating physician must prescribe attendant care in order for attendant care to be compensable, but Defendants cite only *Leathers*, and no other legal authority, for this proposition.

Leathers states the following:

In determining this question, the Commission finds persuasive the guidance of the Virginia Supreme Court and several other jurisdictions that have used the following four-point standard to determine whether attendant care is reasonable and necessary treatment:

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

... [T]he employer must pay for the care when it is performed by a spouse, if (1) the employer knows of the employee's need for medical attention at home as a result of the industrial accident; (2) the medical attention is performed under the direction and control of a physician, that is, a physician must state home nursing care is necessary as a result of the accident and must describe with a reasonable degree of particularity the nature and extent of duties to be performed by the spouse; (3) the care rendered by the spouse must be of the type usually rendered only by trained attendants and beyond the scope of normal household duties; and (4) there is a means to determine with proper certainty the reasonable value of the services performed by the spouse.

Warren Trucking Co. v. Chandler, 221 Va. 1108, 277 S.E.2d 488 (1981).

After the Full Commission purportedly adopted this four-part test for awarding attendant care benefits, the Commission in *Leathers* then cited a series of other jurisdictions, including Massachusetts, Minnesota, Montana, New Mexico, and Arkansas, for propositions of law related to the *Warren Trucking* four-part test.

While the test set forth in *Leathers* is a correct statement of Virginia law, we find no such holding in the opinions of this Court or the Supreme Court of this State. The Full Commission's interpretation of the statute governing attendant care benefits in *Leathers* is not binding on this Court. See *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981) ("Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding" (quotation omitted)).

Although the courts in Virginia, Kentucky, Minnesota, Montana, New Mexico, and Oklahoma have adopted either the four-part test in *Warren Trucking* or a similar modified test, courts in other jurisdictions have adopted a less restrictive test. When asked on appeal to adopt the *Warren Trucking* test, the Supreme Courts of Arizona and Vermont considered and rejected the application of the four-part test, favoring a "flexible case-by-case approach" and renouncing the "rigid framework" of the four-part test, stating that it "[did] not further the remedial purposes of workers' compensation statutes[.]" *Close v. Superior Excavating Co.*, 166 Vt. 318, 324, 693 A.2d 729, 732 (1997) (stating that "we do not believe that [*Warren Trucking's*] rigid frame-

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

work is necessary to decide these cases[;] [t]he Commissioner, aware of *Warren Trucking*, similarly chose to adopt a more flexible case-by-case approach[;] . . . [a]dopting such a test would also conflict with our longstanding practice of construing the workers' compensation statute liberally"); see also *Carbajal v. Indus. Comm'n*, 223 Ariz. 1, 4, 219 P.3d 211, 214 (2009) (concluding, "as the Vermont Supreme Court did, that *Warren Trucking's* rigid framework does not further the remedial purposes of workers' compensation statutes[.]" and "[u]nder Arizona law, compensability turns on the nature of the services, not on the identity of the provider").³

This Court has previously upheld awards from the Industrial Commission contrary to the proposition that a physician's prescription is required for an award of attendant care benefits. See *Ruiz*, 148 N.C. App. at 680-81, 559 S.E.2d at 253 (holding that attendant care compensation was properly awarded when the claimant's brother testified and a life care planner, not a physician, "drafted a life care plan for [the claimant] . . . indicat[ing] that [the claimant] would need attendant care for the remainder of his life" even though the claimant's treating physician stated "that [claimant] has improved steadily, [claimant] can remain at home unattended, and vocational rehabilitation would be appropriate for [claimant]"); *London v. Snak Time Catering*, 136 N.C. App. 473, 479, 525 S.E.2d 203, 207 (2000) (Award upheld when the claimant's wife testified, and a life care planning specialist opined, that the claimant was in need of twenty-four hour per day attendant care; although a physician testified, there was no mention of a physician's "prescription" for attendant care, and his testimony was not included in the Court's enumeration of "findings of fact [that] are relevant to the Commission's conclusions of law" that claimant was entitled to attendant care benefits); *Godwin v. Swift & Co.*, 270 N.C. 690, 694, 155 S.E.2d 157, 160 (1967) (The testimony of the "business manager of the Friendly Elm Nursing Home" and the claimant's brother, without mention of the claimant's treating physician, was sufficient to "support the finding that" attendant care "was reasonably necessary for the welfare of the claimant").

3. We also note that the statutes governing medical compensation in Arizona and Vermont are similar to the North Carolina statute. In Arizona, ARIZ. REV. STAT. § 23-1062(a), states that "[p]romptly, upon notice to the employer, every injured employee shall receive medical, surgical and hospital benefits or other treatment[.] . . ." The Vermont statute provides benefits for "reasonable surgical, medical and nursing services." VT. STAT. ANN. tit. 21, § 640(a). Similarly, N.C. Gen. Stat. § 97-2(19) defines "medical compensation" as "medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment[.]"

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

Our Supreme Court's decisions pertaining to the construction of the Workers' Compensation Act further suggest that the Commission's requirement of a physician's prescription in this case was too restrictive. *See Keller v. Elec. Wiring Co.*, 259 N.C. 222, 225, 130 S.E.2d 342, 344 (1963) ("The Compensation Act requires that it be liberally construed to effectuate the objects for which it was passed—to provide compensation for workers injured in industrial accidents"); *see also Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (stating that "the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions" (quotation omitted)).

We believe the liberal construction of the Workers' Compensation Act suggests, and the prior decisions by our appellate courts require, that the test for attendant care be less restrictive than that imposed by the Full Commission in this case. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (The Court of Appeals has "no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court") (quotation omitted); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court").

For the foregoing reasons, we decline to adopt the four-part test set forth in *Warren Trucking*.⁴ The law of this State does not support an approach in which a physician's prescription is the sole evidence upon which the question of attendant care compensation hinges. Instead, we explicitly adopt what we believe has already been the practice in North Carolina—a flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence,⁵ including but not limited to the following: a prescription

4. We further note that the proposition of law set forth by the Full Commission in this case is even more restrictive than *Warren Trucking*: The Commission required that a "physician has *prescribed* attendant care[.]" while *Warren Trucking* only requires that "a physician must state home nursing care is necessary[.]"

5. With regard to the evidentiary considerations associated with attendant care benefits, American Jurisprudence states the following: "The reasonableness and medical necessity of particular attendant care services can be established by a prescription or a report of a healthcare provider, through the testimony of the claimant or family member, or by the very nature of the injury itself. The testimony of the claimant may, depending

IN RE ESTATE OF GAINNEY v. SOUTHERN FLOORING & ACOUSTICAL CO.

[211 N.C. App. 233 (2011)]

or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury.⁶

Since neither this Court nor the North Carolina Supreme Court has adopted the "four-part" test in *Leathers* for the determination of whether "attendant care is reasonable and necessary[,] the Commission's requirement that a physician's prescription is a prerequisite to attendant care compensation constitutes a misapprehension of law. "If the conclusions of the Commission are based upon a . . . misapprehension of the law, the case should be remanded so 'that the evidence [may] be considered in its true legal light.' " *Chambers*, 360 N.C. at 611, 636 S.E.2d at 555; *see also Holley*, 357 N.C. at 231, 581 S.E.2d at 752. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Industrial Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (concluding that the Commission's opinion set out an incorrect standard and remanding to the Commission for new findings of fact and conclusions of law applying the correct legal standard). Because the Commission's requirement in this case, that a physician's prescription is a prerequisite to attendant care compensation, constitutes a misapprehension of law, we remand the portion of the Opinion & Award denying attendant care benefits to the Commission for new findings of fact and conclusions of law applying the standard enumerated in this opinion. The remainder of the Commission's Opinion & Award is affirmed.

AFFIRMED, in part, REVERSED and REMANDED, in part.

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

on the particular circumstances, be sufficient to establish the compensability of the attendant care services that were rendered. Testimony of the claimant's wife or other family member who rendered the services, the treating physician, and the nurses who provided in-hospital care would also be helpful on that issue." 7 Am. Jur. 3d *Proof of Facts* 143 § 12 (1990).

6. *See Ruiz*, 148 N.C. App. 675, 559 S.E.2d 249; *London*, 136 N.C. App. at 479, 525 S.E.2d at 207; *Godwin*, 270 N.C. at 694, 155 S.E.2d at 160; *Boylan v. Verizon Wireless*, — N.C. App. —, —, 685 S.E.2d 155, 160 (2009), *disc. review denied*, 363 N.C. 853, 693 S.E.2d 918 (2010) (Evidence sufficient when a rehabilitative nurse opined that "due to her current physical condition, [the] Plaintiff needs some level of assistance in the performance of her daily living activities"); *Levens v. Guilford County Schs.*, 152 N.C. App. 390, 396, 567 S.E.2d 767, 771 (2002) (concluding that "the Commission did not err in ordering that . . . the details of any new home construction or remodeling should be governed by 'reasonableness and medical necessity,' without specifically ordering that [the claimant's treating physician's] specifications be followed").

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

PRIMERICA LIFE INSURANCE COMPANY, PLAINTIFF v. JAMES MASSENGILL & SONS CONSTRUCTION COMPANY, TONY W. MASSENGILL, AND JIMMY N. MASSENGILL, SR., DEFENDANTS

No. COA10-996

(Filed 19 April 2011)

Unjust Enrichment— insurance proceeds—JNOV properly granted

The trial court did not err in granting plaintiff's motion for JNOV on plaintiff's claim against defendant James Massengill & Sons Construction Company (JMS) for unjust enrichment. All the elements of plaintiff's unjust enrichment claim were met as a matter of law and JMS failed to prove an irrevocable and material change of position such that it would be unjust to require JMS to refund the proceeds. Furthermore, because JMS could not show any real injury or damages, the issue of balancing the relative equities was not for the jury to consider.

Appeal by defendants from judgment entered 19 November 2009 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 7 March 2011.

Parker Poe Adams & Bernstein LLP, by Cynthia L. Wittmer, Scott E. Bayzle, and James Lynn Werner, for plaintiff-appellee.

Michael W. Strickland & Associates, P.A., by Michael W. Strickland, for defendant-appellants.

McCULLOUGH, Judge.

Defendant James Massengill & Sons Construction Company ("JMS") appeals from an order granting plaintiff Primerica Life Insurance Company's ("Primerica") motion for judgment notwithstanding the verdict and entering partial judgment in favor of Primerica and against defendant JMS. After careful review, we affirm.

I. Background

JMS is a construction company owned and operated, at all relevant times, by three brothers: John David Massengill ("John"), Tony W. Massengill ("Tony"), and Jimmy N. Massengill, Sr. ("Jimmy"). Tony served as President of the company, John served as the company's Vice President, and Jimmy served as the company's Secretary.

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

On 1 January 1992, Primerica issued a “key man” life insurance policy to JMS, insuring the lives of John and Tony in the face amount of one million dollars (\$1,000,000) each (“the Original Policy”). Under the Original Policy, Tony was the primary insured, while John was covered through an “Other Insured Rider.” JMS was designated as the owner of the Original Policy, paid the premiums for the coverage under the Original Policy, and was initially designated as the primary beneficiary of the coverage on both Tony and John.

During the months of October through December of 1995, JMS made a series of changes to the Original Policy, by which the beneficiaries of both Tony and John’s coverage were changed from JMS to the respective spouses and children of Tony and John. Each change was made in writing by letter on the letterhead of JMS and signed by both Tony and John. On 5 June 2000, JMS made another change to the Original Policy, changing the beneficiary of John’s coverage to his estate. This change was also made by letter on the letterhead of JMS and signed by both Tony and John on behalf of JMS.

In late 2001, the Original Policy was approaching the end of its initial ten-year level coverage term and came up for renewal. By its terms, the Original Policy was set to automatically renew at the end of its ten-year term, unless a change was made to the Original Policy by JMS, the policy owner. On 23 October 2001, Primerica notified JMS by letter of the approaching renewal date and informed JMS that higher premium payments would accompany the renewal unless JMS wanted to renew its coverage under newly available insurance products offering lower premiums. In addition, the local Primerica agent, Douglas A. Vinson (“Vinson”), went to the offices of JMS to discuss the renewal options and to obtain the necessary signatures on the renewal paperwork. John was not in the office at that time, but Vinson consulted with Tony regarding the renewal options and the new insurance products offering lower premiums. Tony informed Vinson that both he and John wanted to continue their coverage with no changes. After the meeting, Tony signed a policy change form, bearing the same policy number as the Original Policy, to renew the same life insurance coverage but using the new lower-cost product. John was not present during any part of the meeting, and Vinson never saw John or obtained John’s signature. Vinson forwarded the renewal documents to Douglas Harold Stumbo (“Stumbo”), a National Sales Director for Primerica, who in turn submitted the forms for processing. However, upon receipt of the policy change form, Primerica’s underwriting department notified Stumbo that cov-

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

erage for John could no longer be issued as a rider to Tony's coverage under the lower-cost option requested on the policy change form, and recommended that John's coverage be moved to a separate policy number. As a result, Stumbo altered the policy change form to request deletion of John's rider from the renewed policy and completed an application to convert the rider to coverage under a separate policy number for John. In doing so, Stumbo mistakenly made two changes to the coverage which were unknown to and unauthorized by JMS. Stumbo listed JMS, rather than John's estate, as the beneficiary on the application for conversion of John's rider. Because the prior changes in beneficiary designation were handled by Primerica's home office without the involvement of local agents, Stumbo was unaware that JMS had changed the beneficiary of John's coverage to John's estate. Stumbo also assumed, based on the Original Policy application and the fact that the Original Policy was set up as a "key man" policy, that JMS was the proper beneficiary. Also, Stumbo indicated that John, rather than JMS, was the owner of the converted coverage. Stumbo submitted the conversion application to Primerica in early 2002, without double-checking the beneficiary and ownership designations with JMS or John or Primerica's home office, and signing John's name himself in an attempt to expedite the renewal process.

On 19 February 2002, Primerica issued coverage on John's life under a separate policy number for one million dollars (\$1,000,000) with JMS designated as the beneficiary of the coverage and John designated as the owner of the new policy ("the Rider Conversion Policy"). Following its issuance, the Rider Conversion Policy was sent to JMS by certified mail on 21 June 2002.

John died on 29 March 2005 after battling cancer since 2001. In a letter dated 10 May 2005, JMS notified Primerica of John's death and requested that Primerica cease drafting the monthly premiums from JMS's bank account. In response, Primerica sent a claimant's form to JMS, the beneficiary designated by Stumbo on the Rider Conversion Policy. JMS completed the claimant's form and sent the form to Primerica, asserting that JMS was the rightful beneficiary of John's coverage.

On 10 June 2005, Primerica sent a benefit check payable to JMS in the amount of \$1,000,797.06, representing the face amount of John's coverage, plus a two-month premium refund. JMS immediately deposited the check into its bank account. The company had been struggling financially during the years leading up to John's death and had many outstanding debts at the time it deposited the insur-

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

ance proceeds received from Primerica. On 5 July 2005, fifteen days after depositing the check in its bank account, JMS had spent nearly \$900,000 out of the account. Within two months of receipt of the insurance proceeds, the entire amount had been spent. JMS used the entirety of the proceeds to pay outstanding company debts and employee salaries so that the business could continue.

Judy Massengill (“Judy”), John’s widow and executrix of his estate (“the Estate”), was unaware of JMS’s actions regarding the insurance proceeds for John’s coverage. Accordingly, having been provided Primerica’s contact information by JMS, on 16 June 2005 Judy sent a letter to Primerica requesting documentation to submit a claim for the insurance proceeds for John’s coverage on behalf of the Estate. Primerica responded by letter on 27 June 2005, stating that the Estate was not the designated beneficiary under the Rider Conversion Policy and that a benefit check for the proceeds had been paid to the designated beneficiary. JMS did not inform Judy that it had received the insurance proceeds for John’s coverage.

Thereafter, Judy obtained copies of the insurance documents from Primerica and, after inspecting the documents, suspected that the documents were incorrect and unauthorized. As a result, on 7 December 2006, Judy filed an action on behalf of the Estate against Primerica to recover the one million dollars (\$1,000,000) of insurance coverage on John’s life. The Estate claimed that Primerica had erroneously paid the one million dollars in proceeds to JMS. During the pendency of the action by the Estate, Primerica discovered the mistaken changes made by Stumbo during the renewal process and determined that the Estate was in fact the correct beneficiary. Subsequently, Primerica paid the one million dollars in proceeds, for the second time, to the Estate and settled all of the Estate’s claims against Primerica. As a result, on 12 October 2007, the Estate dismissed its action against Primerica.

On 21 February 2007, before the original action by the Estate against Primerica was dismissed, Primerica filed a third-party complaint against JMS, Tony, and Jimmy, asserting a claim of unjust enrichment to recover the one million dollars in proceeds mistakenly paid to JMS for John’s coverage. In response, JMS, Tony, and Jimmy filed an Answer and certain counterclaims, all of which formed the basis of the present action. However, Tony and Jimmy individually dismissed all of their counterclaims prior to proceeding to trial.

The trial of the present action commenced on 14 September 2009. At the close of Primerica’s case-in-chief, JMS dismissed all of its

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

remaining counterclaims. At the close of all the evidence, Primerica moved for a directed verdict, which was denied by the trial court. On 17 September 2009, seven issues were submitted to the jury on Primerica's claim for unjust enrichment. The first issue concerned Primerica's claim against JMS and was as follows:

Was the Defendant [JMS] unjustly enriched by receiving death benefits from a life insurance policy on the life of John D. Massengill, issued by the Plaintiff [Primerica] in the amount of \$1,000,000.00?

The remaining six issues submitted to the jury, applicable only in the event the first issue was answered in the affirmative, concerned the imposition of individual liability upon Tony and Jimmy. The jury answered the first issue in the negative, and therefore, did not consider the remaining six issues regarding Tony and Jimmy's individual liability.

On 2 October 2009, Primerica filed a motion for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure and/or for a new trial. Primerica's motion requested JNOV in its favor and against JMS on the first issue of JMS's liability for unjust enrichment and a new trial on the remaining six issues. This post-trial motion was heard by the trial court on 26 October 2009. Following the hearing, the trial court issued an order on 19 November 2009 granting JNOV in favor of Primerica and against JMS. In doing so, the trial court found that JMS's own admissions and testimony, the unchallenged documentary evidence introduced at trial, and other undisputed evidence, all viewed in the light most favorable to JMS, could support no other finding or conclusion but that JMS was unjustly enriched by the receipt of the one million dollars in insurance proceeds to which it was not entitled. From this order, JMS appeals.

II. Judgment notwithstanding the verdict

JMS first argues that the trial court erred in granting Primerica's motion for JNOV. Pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, when a party's motion for directed verdict at the close of the evidence is denied, that party "may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.]" N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2009). A motion for JNOV provides the trial court with an opportunity to reconsider the question of the sufficiency of the evidence after the jury has returned a verdict and

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

permits the court to enter judgment “in accordance with the movant’s earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury.” *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 245, 423 S.E.2d 504, 507 (1992) (internal quotation marks and citation omitted).

The propriety of granting JNOV is determined by the same considerations as that of the movant’s prior motion for directed verdict—whether the evidence, taken in the light most favorable to the non-movant, is insufficient, as a matter of law, to support a verdict for the non-moving party. *N.C. Nat’l Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979); *see also Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986) (“The same standard is to be applied by the courts in ruling on a motion for JNOV as is applied in ruling on a motion for a directed verdict.”). Thus, both a motion for directed verdict and a motion for JNOV ask “whether the evidence is sufficient ‘to take the case to the jury.’” *Sweatt v. Wong*, 145 N.C. App. 33, 41, 549 S.E.2d 222, 227 (2001) (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993)). “When a judge decides that a directed verdict [or JNOV] is appropriate, actually he is deciding that the question has become one exclusively of law and that the jury has no function to serve.” *Hodgson Constr., Inc. v. Howard*, 187 N.C. App. 408, 411, 654 S.E.2d 7, 10 (2007) (alteration in original) (internal quotation marks and citation omitted).

Although Rule 50 “contemplates that *any* party may move for a directed verdict at the close of all the evidence,” such verdicts in favor of the party with the burden of proof “are rarely granted.” *Burnette*, 297 N.C. at 536, 256 S.E.2d at 395. “This is so because, even though proponent succeeds in the difficult task of establishing a clear and uncontradicted prima facie case, there will ordinarily remain in issue the credibility of the evidence adduced by proponent.” *Id.* Accordingly, a trial court must not direct a verdict in favor of the party with the burden of proof when the party’s right to recover “depends upon the credibility of his [own] witnesses.” *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E.2d 297, 311 (1971); *see also Murray v. Murray*, 296 N.C. 405, 409, 250 S.E.2d 276, 277-78 (1979). However, “a directed verdict or a judgment notwithstanding the verdict may be entered in favor of the party with the burden of proof ‘where credibility is manifest as a matter of law.’” *Price*, 315 N.C. at 527, 340 S.E.2d at 411 (quoting *Burnette*, 297 N.C. at 536, 256 S.E.2d at 395).

Our Supreme Court has recognized three situations where “the credibility of movant’s evidence is manifest as a matter of law”:

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

(1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.

(2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.

(3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions.

Burnette, 297 N.C. at 537-38, 256 S.E.2d at 396 (internal quotation marks and citations omitted). "In such situations it is proper to direct verdict for the party with the burden of proof if the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *Id.* at 536, 256 S.E.2d at 395; *see also Murdock v. Ratliff*, 310 N.C. 652, 659, 314 S.E.2d 518, 522 (1984) ("[I]n order to justify granting a motion for a directed verdict in favor of the party with the burden of proof, the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn.").

This Court's review of the trial court's grant or denial of JNOV is *de novo*. *Hodgson Constr.*, 187 N.C. App. at 412, 654 S.E.2d at 11. This Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *Id.*

In the present case, Primerica asserts a claim for unjust enrichment against JMS to recover the one million dollars in insurance proceeds that Primerica mistakenly paid to JMS pursuant to the terms of the Rider Conversion Policy. JMS contends the trial court erred in granting Primerica's motion for JNOV on Primerica's claim against JMS for unjust enrichment because Primerica failed to prove that JMS was not entitled to the insurance proceeds pursuant to the terms of the Rider Conversion Policy and because the credibility and inequitable conduct of Primerica's agents in procuring the Rider Conversion Policy were issues to be considered and determined by the jury. Alternatively, JMS contends that where a valid express contract exists, unjust enrichment is unavailable. JMS argues that Primerica is precluded from asserting its claim of unjust enrichment because the Rider Conversion Policy is valid on its face and was delivered and accepted by JMS and John. We find JMS's arguments are without merit under the circumstances presented in the present case.

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

Our Courts have found that “[t]he issue of who stands for the loss and disappointment when money has been disbursed under some mistaken belief of entitlement is always problematic.” *First Nat’l City Bank v. McManus*, 29 N.C. App. 65, 70, 223 S.E.2d 554, 557 (1976). However, our Supreme Court has held that, under some circumstances, an insurer is entitled to recover proceeds paid by it under a mistaken belief that the terms of the insurance contract required such payment. *U.S. Fidelity & Guaranty Co. v. Reagan*, 256 N.C. 1, 9, 122 S.E.2d 774, 780 (1961). “Generally, when money is paid to another under the influence of a mistake of fact, and it would not have been paid had the person making the payment known that the fact was otherwise, the money may be recovered.” *Tarlton v. Keith*, 250 N.C. 298, 306, 108 S.E.2d 621, 626 (1959). An action for such recovery is permitted “on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment and is liable for money had and received.” *Reagan*, 256 N.C. at 9, 122 S.E.2d at 780 (internal quotation marks and citation omitted); see also *N.C. Farm Bureau Mut. Ins. Co. v. Greer*, 54 N.C. App. 170, 172, 282 S.E.2d 553, 555 (1981).

“An action for money had and received may be maintained as a general rule whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff.” *Allgood v. Wilmington Sav. & Trust Co.*, 242 N.C. 506, 512, 88 S.E.2d 825, 829 (1955) (internal quotation marks and citation omitted).

Recovery is allowed upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? . . . The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it.

Id.

An action for money had and received, therefore, allows a plaintiff to maintain an equitable action to recover a payment mistakenly made to the defendant “on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment.” *Johnson v. Hooks*, 21 N.C. App. 585, 590, 205 S.E.2d 796, 800 (1974). Under a claim for unjust enrichment, a plaintiff must establish certain essential elements: (1) a measurable benefit was

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

conferred on the defendant, (2) the defendant consciously accepted that benefit, and (3) the benefit was not conferred officiously or gratuitously. *Progressive Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 184 N.C. App. 688, 695-96, 647 S.E.2d 111, 116 (2007). In addition, “a payment induced by mistake cannot be recovered if the payee, in equity and good conscience, is entitled to retain the money received.” *Tarlton*, 250 N.C. at 306, 108 S.E.2d at 626.

In the present case, the first element—that Primerica conferred a measurable benefit on JMS—is undisputed by the parties and is therefore not at issue. At trial, Tony admitted that he and Jimmy submitted a claimant’s form to Primerica on behalf of JMS for the payment of the insurance proceeds for John’s coverage, that JMS in fact received a benefit check from Primerica in the amount of \$1,000,797.06, and that JMS deposited the check into its bank account. These admissions are further supported by the unchallenged documentary evidence, including a copy of Primerica’s check to JMS in the amount of \$1,000,797.06 and a copy of JMS’s bank deposit slip. Thus, the fact that a measurable benefit in the form of insurance proceeds in the amount of one million dollars was conferred on JMS on 10 June 2005 is uncontroverted.

Similarly, the parties do not dispute the second and third elements of Primerica’s unjust enrichment claim. JMS consciously accepted the benefit of the one million dollars in insurance proceeds by voluntarily submitting the claimant’s form to Primerica, accepting and depositing the benefits check, and expending the money. The same admissions and uncontroverted documentary evidence likewise establish this fact. Nor is there any argument that the insurance proceeds were conferred by Primerica as a gift to JMS or to officiously intermeddle in the affairs of JMS. Thus, the second and third elements of Primerica’s unjust enrichment claim are not at issue.

However, whether JMS was entitled to receive the benefit check and/or retain the insurance proceeds is the determinative issue in the present case. On this point, JMS argues that John’s intent in selecting a beneficiary is material to the issue of entitlement and that the evidence introduced at trial established an issue of fact for the jury as to the true intended beneficiary of John’s insurance coverage. JMS further contends that the credibility of Primerica’s agents Vinson and Stumbo bears on the issue of John’s intent in selecting a beneficiary, and therefore because the credibility of Primerica’s own witnesses bears on the issue of entitlement of JMS to the proceeds, the question

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

was for the jury to determine and was not the proper subject of a motion for JNOV. We find JMS's contentions to be misplaced.

"We first note the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. It follows from this rule that those persons entitled to the proceeds of a life insurance policy must be determined in accordance with the contract." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citations omitted). JMS correctly notes the rule that, "[i]n making such a determination, the intention of the parties controls any interpretation or construction of the contract, and intention must be derived from the language employed." *Id.* However, JMS's application of that rule to the circumstances of the present case is misguided.

The terms of the Original Policy create a clear distinction between the policy owner and the person whose life is to be insured. The "definitions" section of the Original Policy defines "the Insured" as the "person whose life is insured under the Policy," and the owner of the policy is defined as "the Insured unless otherwise provided in the application[.]" Notably, in the Original Policy application, "James Massengill & Sons" is designated as the Policy Owner, while Tony W. Massengill is designated as the Insured and John D. Massengill is designated as the "Other Insured" for purposes of coverage under the "Other Insured Rider."

In addition, the Policy contains these pertinent general provisions:

OWNER OF POLICY—This Policy belongs to you, the owner. During the lifetime of the Insured, you have all of the rights described in this Policy.

CHANGE OF BENEFICIARY—A change of Beneficiary may only be made by Notice to [Primerica]. Such Notice to [Primerica] must be signed by you [the owner] while the Insured is alive.

CHANGE OF BENEFICIARY—A change of Beneficiary for this Rider may only be made by filing a Notice to [Primerica]. Such Notice must be signed by you [the owner] while the Other Insured Person is alive.

(Emphasis added.) As our Supreme Court has stated:

The distinction [between the policy owner and the insured] is a crucial one, for the owner of an insurance policy acquires the authority to exercise any rights or privileges granted therein . . .

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

The power to change beneficiaries falls squarely into the category of rights and privileges under the contract. Consequently, it must be recognized that the owner is the only person who can exercise this power, even though the owner is not the insured.

Dortch, 318 N.C. at 381-82, 348 S.E.2d at 797. This Court has also held “only the owner of a life insurance policy may change the beneficiary.” *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 361, 558 S.E.2d 504, 508 (2002). Thus, any changes made to an insurance policy affecting the beneficiary designation or the ownership of the policy must be made by the policy owner. If not, the changes are a legal nullity and of no force and effect, being that the changes were never validly assented to by the proper party. *See Dortch*, 318 N.C. at 381-82, 348 S.E.2d at 797 (holding an attempted change in beneficiary to an insurance policy by the insured was a nullity and ineffectual because only the policy owner can effectively make such changes). The express terms of the Original Policy itself make these rules explicit. Thus, only JMS, as the owner of the Original Policy, was authorized to make any changes, especially those affecting the beneficiary designation or the ownership, to the Original Policy.

In the present case, the unchallenged documentary evidence and the admissions of JMS show that JMS’s June 2000 designation of John’s estate as the beneficiary of his coverage—a change made in writing on JMS letterhead and signed by both Tony and John on behalf of JMS—was the last beneficiary change made or approved by JMS with regard to John’s coverage. The designation of JMS as beneficiary of John’s coverage in connection with the 2002 renewal of the Original Policy and conversion of John’s rider was purely the result of acts by Primerica’s agent Stumbo and was neither approved nor authorized nor requested by JMS. At trial, Tony, acting President of JMS, stated that the June 2000 designation of John’s estate was the last known beneficiary designation authorized by JMS under John’s coverage and that he was unaware of any changes to that designation made or authorized by JMS at any time thereafter. Tony also admitted at trial that upon signing the policy change form in 2001 after his consultation with Vinson, his understanding was that the Original Policy, owned by JMS, was simply being renewed under a lower-cost product and that no other changes were authorized beyond the renewal of the existing insurance coverage.

Further, in its answer and counterclaim in the present case, JMS stated:

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

Massengill & Sons, the owner of the policy covering the lives of Tony and John Massengill, never executed a document deleting the coverage for John Massengill, nor did it execute a new application to insure the life of John Massengill.

“A party is bound by his pleadings and, unless withdrawn, amended or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader.” *Bratton v. Oliver*, 141 N.C. App. 121, 125, 539 S.E.2d 40, 43 (2000) (quoting *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964)). “The effect of a judicial admission is to establish the fact for the purposes of the case and to eliminate it entirely from the issues to be tried.” *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 162, 284 S.E.2d 697, 700 (1981). The above statement made by JMS in its Answer and Counterclaim was contained in JMS’s recitation of factual allegations and was not altered or dismissed in its entirety before proceeding to trial, thereby rendering the statement conclusive evidence that the Rider Conversion Policy was never requested, authorized, or assented to by JMS.

Therefore, JMS’s own admissions established that JMS had not authorized the changes made to the beneficiary and ownership designations during the renewal process of the original Policy. As such, the Rider Conversion Policy was void *ab initio* and is a legal nullity. “A void contract is no contract at all; it binds no one and is a mere nullity.” *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968) (internal quotation marks and citation omitted). Consequently, the resulting void Rider Conversion Policy is without legal effect and confers no rights or obligations upon the parties to the void agreement.

In addition, John’s rider under the Original Policy contained the following pertinent provision:

AUTOMATIC RENEWAL PROVISION—If this Rider is continued in force to the end of the Term Period, it will be automatically renewed under the terms of this provision unless [Primerica] receive[s] written notice of cancellation. The renewal shall be for an additional ten year Term Period . . . Evidence of insurability will not be required for renewal, only payment of the applicable premiums for the rates then in effect.

Because the Rider Conversion Policy was void *ab initio* and because JMS continued to pay the premium amounts requested, the Original Policy, including John’s rider, would have automatically renewed under the automatic renewal provision, with the existing beneficiary

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

designations at the time of renewal remaining unchanged. As Tony testified at trial, this was in accordance with his and John's wishes at the time of the renewal. Hence, the last beneficiary designation of John's estate made by JMS to the Original Policy for John's coverage remained controlling.

Accordingly, John's intent in selecting a beneficiary under the circumstances of this case is totally irrelevant to the issue of entitlement. John was not the owner of the Original Policy, and therefore he had no right under either the express terms of the Original Policy or the law in North Carolina to unilaterally change the beneficiary designation. Furthermore, because JMS's own admissions established that JMS had neither authorized the changes made to the beneficiary and ownership designations under the Rider Conversion Policy nor requested the termination and conversion of John's rider to a separate policy, the credibility of Primerica's witnesses is inapposite to the issue of entitlement. JMS's own admissions unequivocally established that the Rider Conversion Policy, the only contract under which JMS can maintain a claim of entitlement to the proceeds, was void as a matter of law, and no reasonable inference to the contrary can be drawn. Because the Rider Conversion Policy was void *ab initio*, its existence likewise does not preclude Primerica from asserting its claim of unjust enrichment. Therefore, the trial court properly concluded that all the elements of Primerica's unjust enrichment claim were met as a matter of law.

Nevertheless, because an action for unjust enrichment is an equitable claim, our Supreme Court has limited recovery of such mistaken payments to only those situations where "the payment has not caused such a change in the position of the payee that it would be unjust to require a refund." *Reagan*, 256 N.C. at 9, 122 S.E.2d at 780.

Though the issue is never simple or easily explained, we are of the opinion that [a] change of position is not detrimental, and is not a defense, if the change can be reversed, or the status quo can be restored, without expense. The burden of such an irrevocable and material change of position that the payee cannot be placed in status quo is on the payee.

McManus, 29 N.C. App. at 71, 223 S.E.2d at 558 (internal quotation marks and citation omitted) (alteration in original). In addition, "[a]s a general rule, it is no defense to an action for the recovery of a payment made under mistake of fact that the money or property has been paid over to another or spent by the payee." *Reagan*, 256 N.C. at

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

(211 N.C. App. 252 (2011))

10, 122 S.E.2d at 781 (internal quotation marks and citation omitted). Further, “plaintiff’s negligence, if any, and defendant’s ostensible good faith, standing alone, constitute an insufficient defense to plaintiff’s claim for repayment.” *McManus*, 29 N.C. App. at 70, 223 S.E.2d at 558.

In the present case, Primerica paid the insurance proceeds for John’s coverage to JMS under the mistaken belief that the terms of the Rider Conversion Policy were both valid and accurate and that JMS was thereby the proper beneficiary. The burden then falls on JMS, the payee of the mistaken proceeds, to prove an irrevocable and material change of position such that it would be unjust to require JMS to refund the proceeds. JMS has failed to carry this burden. JMS claims that it relied on the insurance proceeds to “keep the business going” by paying off outstanding company debts and paying employees so that they could continue working. However, as we have stated, the mere fact that JMS has spent the money or paid the money over to others, even if done in good faith to save its business, is not a defense to Primerica’s claim for repayment. *Reagan*, 256 N.C. at 10, 122 S.E.2d at 781; *McManus*, 29 N.C. App. at 70, 223 S.E.2d at 558. Moreover, requiring JMS to refund the money simply places JMS back in the position it was in before receiving the mistaken payment. JMS has failed to demonstrate any injury, much less a material and irrevocable change of position, which it has suffered in reliance on the mistaken payment.

JMS also asserts that the negligent actions of Primerica’s agents Vinson and Stumbo in failing to ascertain the proper beneficiary and ownership designations during the renewal and conversion process and in signing John’s signature to obtain the Rider Conversion Policy caused the mistake to occur, and therefore, Primerica’s inequitable conduct bars it from recovery under an equitable claim such as unjust enrichment. At the very least, JMS asserts that the relative equities of the parties is a question for the jury to determine, and therefore, JNOV is not proper under these circumstances. Essentially, JMS asserts an application of the clean hands doctrine.

It is true that “[w]hether plaintiff committed an unconscionable act and whether her actions were more egregious than those of defendants, are questions of material fact to be decided by a jury and not by the court.” *Ferguson v. Ferguson*, 55 N.C. App. 341, 347, 285 S.E.2d 288, 292 (1982). However, in order for the issue of balancing the relative equities to reach the jury, the defendant must have suffered some injury or have been damaged by the inequitable conduct of the

PRIMERICA LIFE INS. CO. v. JAMES MASSENGILL & SONS CONSTR. CO.

[211 N.C. App. 252 (2011)]

plaintiff. *See Ray v. Norris*, 78 N.C. App. 379, 385, 337 S.E.2d 137, 142 (1985) (“The doctrine of clean hands is only available to a party who was injured by the alleged wrongful conduct.”).

As stated above, JMS has failed to demonstrate any injury or damages, other than that the money was spent to save its “dying company,” resulting from Primerica’s mistaken payment of the insurance proceeds. Again, that the proceeds have been spent or paid over to others, even if done in good faith, is insufficient. *Reagan*, 256 N.C. at 10, 122 S.E.2d at 781. Moreover, JMS’s counsel unequivocally stated at trial that the only damages suffered by JMS as a result of Primerica’s mistaken payment is the expenditure of attorney’s fees in defending the present action. Because JMS cannot show any real injury or damages, the issue of balancing the relative equities was not for the jury to consider.

In sum, JMS’s own admissions establish that JMS, as owner of the Original Policy, neither authorized the changes made to the beneficiary and ownership designations under the Rider Conversion Policy nor requested the termination and conversion of John’s rider to a separate policy. The unchallenged documentary evidence further supports JMS’s admissions. We therefore find that credibility is manifest as a matter of law in establishing that the Rider Conversion Policy, the only contract under which JMS can maintain a claim of entitlement to the proceeds, was void as a matter of law, and no reasonable inference to the contrary can be drawn. Therefore, Primerica’s payment of the insurance proceeds for John’s coverage to JMS under the mistaken belief that the Rider Conversion Policy was valid and that JMS was thereby the proper beneficiary may be recovered. Because JMS was not entitled to the insurance proceeds, it may not, in equity and good conscience, retain those funds. The conduct of Primerica’s agents, while unacceptable, has no bearing in the present case, as JMS has failed to show any injury or damages resulting from such inequitable conduct. Thus, the trial judge properly found there were no issues of fact or credibility for the jury to determine, and therefore JNOV in favor of Primerica was proper.

We note that “[a] motion for JNOV . . . ‘is cautiously and sparingly granted.’” *Sweatt*, 145 N.C. App. at 41, 549 S.E.2d at 226-27 (quoting *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337-38, *aff’d in part and rev’d in part*, 313 N.C. 362, 329 S.E.2d 333 (1985)). However, when the evidence is legally insufficient “‘to support a verdict for the [prevailing party],’” *Post & Front Properties v. Roanoke Construction Co.*, 117 N.C. App. 93, 96, 449

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

S.E.2d 765, 767 (1994) (quoting *Douglas v. Doub*, 95 N.C. App. 505, 511, 383 S.E.2d 423, 426 (1989)), and when “the question has become one exclusively of law [such] that the jury has no function to serve,” *Howard*, 187 N.C. App. at 411, 654 S.E.2d at 10 (internal quotation marks and citation omitted), a motion for JNOV may be properly granted. Accordingly, the trial judge in the present case properly granted Primerica’s motion for JNOV.

Because we find the trial court properly granted Primerica’s motion for JNOV, we need not address JMS’s remaining arguments that the trial court erred in not directing a verdict in favor of JMS and that the trial court erred in not instructing the jury on the equitable defenses of unclean hands and equitable estoppel.

III. Conclusion

The uncontroverted evidence presented at trial, including JMS’s own admissions and the unchallenged documentary evidence, conclusively establish the elements of Primerica’s claim for unjust enrichment. In addition, JMS has failed to show any injury or damages resulting from the conduct of Primerica’s agents. As a result, the trial court properly concluded that Primerica was entitled to JNOV, and therefore, the trial court’s order granting JNOV in favor of Primerica must be affirmed.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

ANGEL C. RODRIGUEZ AND WIFE, CAROL I. RODRIGUEZ, PLAINTIFFS V. MICHELLE C. RODRIGUEZ, DEFENDANT

No. COA10-690

(Filed 19 April 2011)

1. Child Custody— subject matter jurisdiction—prior juvenile matter terminated

The trial court had subject matter jurisdiction to consider a custody claim by grandparents where a prior juvenile matter was terminated by a juvenile review order that placed the physical and legal custody of the children with defendant, ended the

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

involvement of both DSS and the Guardian ad Litem program, and included no provisions requiring ongoing supervision or court involvement.

2. Child Custody and Support— grandparents—standing— custody distinguished from visitation

Plaintiffs had standing to proceed in an action for custody pursuant to N.C.G.S. § 50-13.1(a) where they alleged they were the grandparents of the children and that defendant had acted inconsistently with her parental status and was unfit because she had neglected the children. A grandparent's claim for visitation may be different from a custody claim and has different standing requirements.

3. Parent and Child— custody—actions not inconsistent with parental status

The trial court erred by concluding that defendant had acted inconsistently with her parental status and by awarding plaintiffs visitation where defendant did not voluntarily cede parental authority to another party; a finding that defendant's children had been adjudicated dependent in an earlier proceeding was not alone sufficient to establish that defendant acted in a manner inconsistent with her parental status; the trial court's findings did not indicate that defendant had voluntarily engaged in conduct that would trigger the forfeiture of her protected status; and additional findings that could reflect badly on defendant were not sufficient to show conduct inconsistent with being a parent or that she was unfit as a parent.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from order entered 18 February 2010, *nunc pro tunc* 14 January 2010 by Judge Napoleon B. Barefoot, Jr. in District Court, Brunswick County. Heard in the Court of Appeals 30 November 2010.

Harvey W. Barbee, Jr., and Robert G. Scott, for defendant-appellant.

No brief from plaintiff-appellees.

STROUD, Judge.

Plaintiffs sued for custody of defendant's children and were awarded visitation. Defendant filed a motion to dismiss. The trial court denied defendant's motion to dismiss and awarded plaintiffs

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

visitation with the children. For the following reasons, we affirm the portion of the trial court order which denied defendant's motion to dismiss, and we reverse that portion of the trial court order which awarded plaintiffs visitation with the children.

I. Background

This appeal arises from a custody action between plaintiffs, the paternal grandparents of Matt and Nan¹ ("the children"), and defendant, the children's mother. The children's father died in February 2007. In February 2008, the Brunswick County Department of Social Services ("DSS") filed a petition alleging the children were abused, neglected, and dependent, and the children were removed from defendant's legal and physical custody. On 3 March 2008, plaintiffs initiated this Chapter 50 action seeking custody of the children; plaintiffs did not intervene in the pending juvenile matter.² In April 2008, the juvenile court adjudicated the children dependent, but not abused or neglected. In July 2008, the children were returned to the physical custody of defendant by the juvenile court. In November 2009, defendant filed an answer and a motion to dismiss the custody action filed by plaintiffs. On 18 February 2010, *nunc pro tunc* 14 January 2010, the trial court denied defendant's motion to dismiss and determined that "defendant ha[d] acted inconsistently with her constitutionally protected status as a parent . . . , and it is in the best interests of the minor children that their primary placement be with her, with secondary custody in the form of visitational [sic] privileges to the Plaintiffs[.]" Defendant appeals.

II. Subject Matter Jurisdiction

This case presents two issues regarding subject matter jurisdiction. The first issue, regarding the exclusive jurisdiction of the juvenile court, we raise *sua sponte*. *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) ("It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*."). The second issue, regarding the denial of defendant's motion to dismiss for plaintiffs' lack of standing, was argued by the appellant. *See Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16

1. Pseudonyms have been used to protect the identity of the minors.

2. Although the record shows that plaintiffs had visitation with the children when they were in the custody of DSS, it does not demonstrate that plaintiffs intervened in the juvenile proceeding or that any juvenile order addressed their claims as to the children.

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim."), *disc. review denied*, 359 N.C. 631, 613 S.E.2d 688 (2005).

Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings.

McKoy v. McKoy, — N.C. App. —, —, 689 S.E.2d 590, 592 (2010) (citations and quotation marks omitted).

A. Juvenile Court Jurisdiction

[1] While the record shows that the juvenile court obtained jurisdiction over the children and adjudicated them as dependent, it does not clearly demonstrate that the juvenile court terminated its jurisdiction. On 22 February 2008, the Brunswick County Department of Social Services filed its petition alleging abuse, neglect, and dependency. Soon thereafter, on 3 March 2008, plaintiffs filed their Chapter 50 complaint seeking custody of the children.³ Thus, the juvenile court obtained jurisdiction over the minor children before the filing of plaintiffs' complaint. *See* N.C. Gen. Stat. § 7B-200(a) (2007) ("The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent."). N.C. Gen. Stat. § 7B-201(a) provides:

When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.

N.C. Gen. Stat. § 7B-201(a) (2007). Here, as the juvenile court obtained jurisdiction over the children, *see* N.C. Gen. Stat. § 7B-200(a), the juvenile court had continuing exclusive jurisdiction unless jurisdiction was "terminated by order of the court[.]" N.C. Gen. Stat. §§ 7B-200(a), -201(a).

3. Although the complaint does not refer to any statute, it is obvious from the factual allegations and request for relief that it was based upon N.C. Gen. Stat. § 50-13.1(a).

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

The record on appeal before our Court did not include any orders from the juvenile court subsequent to the 5 May 2008 adjudication order. Under these circumstances, it is appropriate for this Court to take judicial notice of the 4 August 2008 juvenile review order which was entered in the juvenile case. *See In re Stratton*, 159 N.C. App. 461, 462, 583 S.E.2d 323, 324 (referring to an order terminating the parental rights of the appellant by stating, “[t]his Court is entitled to take judicial notice of this recent order”), *disc. review denied and appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003). Thus, we must consider whether the juvenile review order is an order which terminates the jurisdiction of the juvenile court under N.C. Gen. Stat. § 7B-201(a). Unfortunately, the juvenile review order does not make the answer to this question obvious.

In the juvenile review order, the juvenile court made the following findings of fact:

5. That it is in the best interest of the minor children that they continue in the physical custody of their mother, Michelle Rodriguez, and that legal custody be returned to her.

6. That continued involvement by either the Department of Social Services or the Guardian ad Litem is unnecessary.

The juvenile court ordered:

1. That the juveniles are continued in the physical custody of their mother, Michelle Rodriguez, and legal custody is returned to her as well. Ms. Rodriguez shall continue to provide dental and medical care for the children. They shall continue to receive speech, and occupational therapy and psychological therapy.

2. That any prior custody order placing the minor children with the Department of Social Services is vacated.

3. That the Department of Social Services and the Guardian ad Litem program are relieved of any further involvement in this case.

Although the juvenile review order continued physical custody with defendant and returned legal custody to defendant, it included a provision requiring her to continue providing “dental and medical care for the children[,]” but without setting out any details as to the actual “dental and medical care” she must provide. The juvenile review order further provided that the children “shall continue to receive speech, and occupational therapy and psychological therapy”

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

but did not state who was to provide the therapy. By relieving DSS and the Guardian ad Litem program of responsibility as to the children and by vacating “any prior custody order” the juvenile court seems to have indicated its intent to end its involvement with the children entirely.

In *In re S.T.P.*, this Court concluded that merely ordering that a case is closed is not sufficient to terminate jurisdiction. — N.C. App. —, —, 689 S.E.2d 223, 227 (2010). In addition, relieving the Department of Social Services of further responsibility in a case does not terminate jurisdiction of the juvenile court. See *In re Baby Boy Scarce*, 81 N.C. App. 531, 542, 345 S.E.2d 404, 411, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986). We find that this case is distinguishable from *S.T.P.* and *Scarce* as the juvenile review order here contains additional language which, upon consideration of the order as a whole, we conclude terminates jurisdiction of the juvenile court.

In *S.T.P.*, the trial court noted that in the order which “closed” the case that

neither Mother nor Father were returned to their pre-petition legal status. The maternal grandmother continued to be the legal guardian for S.T.P. for over six years. The plain language of N.C. Gen. Stat. § 7B-201(b) states that when the district court’s jurisdiction terminates, the legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise.

S.T.P. at —, 689 S.E.2d at 227 (citation and quotation marks omitted). In contrast to *S.T.P.*, the juvenile review order returned defendant herein to her status prior to the filing of the petition, as she kept physical custody and regained legal custody of the children. In *Scarce*, the order which relieved the Department of Social Services of responsibility as to the juvenile also

found, after numerous days of testimony, that the best interest of Baby Boy Scarce would be served by awarding legal custody to his foster parents with limited visitation privileges to the child’s father. The father’s visitations with the child are to be monitored by the Durham Community Guidance Clinic for Children and Youth in Durham and the Guidance Clinic is to report to the trial court concerning the visitations. The trial court has not terminated its jurisdiction over the child, nor have the responsibilities

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

of the guardian ad litem been terminated by the court. The participation of DSS in this matter is not statutorily required or as a practical matter necessary. We hold that the trial court did not err in relieving DSS of any further responsibility in this matter.

Scarce at 542, 345 S.E.2d at 411. In *Scarce*, although DSS ceased its involvement with the case, the order anticipated ongoing supervision of visitation and did not establish a permanent placement for the juvenile. *Id.*

Because the juvenile review order herein placed the children in both the physical and legal custody of defendant, ended involvement of both DSS and the Guardian ad Litem program, and included no provisions requiring ongoing supervision or court involvement, we conclude that the order terminated the jurisdiction of the juvenile court over the children as contemplated by N.C. Gen. Stat. § 7B-201(a). Accordingly, the trial court had subject matter jurisdiction to consider plaintiffs' custody claim as the juvenile matter had been terminated; however, we stress the need for the parties to include sufficient documentation in the record to demonstrate subject matter jurisdiction and the need for the juvenile courts to be mindful of the requirements of N.C. Gen. Stat. § 7B-201(a) when terminating juvenile court jurisdiction.

B. Standing

[2] Defendant first argues that “the trial court erred in denying her motion to dismiss . . . for lack of standing.” (Original in all caps.) At this point, we should make a distinction which has not been clearly made in many cases: Although it is axiomatic in custody disputes *between parents* that “[v]isitation privileges are but a lesser degree of custody[,]” *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978), when a grandparent is seeking visitation with grandchildren, a claim for visitation may be distinct from a claim for custody and standing requirements differ for each claim. *See Perdue v. Fuqua*, 195 N.C. App. 583, 586, 673 S.E.2d 145, 148 (2009) (“[O]ur Courts have distinguished grandparents’ standing to seek visitation from grandparents’ standing to seek custody. In order for a grandparent to initiate a proceeding for visitation, there must be an ongoing custody proceeding and the child’s family must not be an intact family. . . . In contrast, a grandparent initiating a proceeding for custody must allege unfitness of a parent due to neglect or abandonment.”). There are four statutes under which grandparents can bring a cause of action for custody or visitation. *See Penland v. Harris*, 135 N.C. App. 359, 361, 520 S.E.2d 105, 106 (1999). While plaintiffs clearly requested custody and not vis-

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

itation in their complaint, they did not clearly state the statutory basis of their claim.

The first of the four statutes under which a grandparent, or “[a]ny parent, relative, or other person” may seek custody is N.C. Gen. Stat. § 50-13.1(a) which provides that

[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. . . . Unless a contrary intent is clear, the word “custody” shall be deemed to include custody or visitation or both.

N.C. Gen. Stat. § 50-13.1(a) (2007). “When grandparents initiate custody [as opposed to visitation] lawsuits under G.S. § 50-13.1(a), . . . the grandparent must show that the parent is unfit or has taken action inconsistent with her parental status in order to gain custody of the child.” *Eakett v. Eakett* 157 N.C. App. 550, 553, 579 S.E.2d 486, 489 (2003); *see also Perdue* at 586, 673 S.E.2d at 148 (2009) (“Despite the statute’s, [N.C. Gen. Stat. § 50-13.1(a)], broad language, our Courts have distinguished grandparents’ standing to seek visitation from grandparents’ standing to seek custody. In order for a grandparent to initiate a proceeding for visitation, there must be an ongoing custody proceeding and the child’s family must not be an intact family. . . . In contrast, *a grandparent initiating a proceeding for custody must allege unfitness of a parent due to neglect or abandonment.*” (emphasis added)). Here, plaintiffs alleged that defendant had acted inconsistently with her parental status and was unfit in that she neglected the children. Therefore, plaintiffs had standing to bring a custody action pursuant to N.C. Gen. Stat. § 50-13.1(a). *See Eakett* at 553, 579 S.E.2d at 489.

The second statute under which grandparents may seek visitation is N.C. Gen. Stat. § 50-13.2(b1) which provides that “[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate.” N.C. Gen. Stat. § 50-13.2(b1) (2007). N.C. Gen. Stat. § 50-13.2(b1) applies to claims for visitation and not for primary physical and legal custody, and thus it is inapplicable to this case. *See Hill v. Newman*, 131 N.C. App. 793, 796, 509 S.E.2d 226, 229 (1998) (“By its very language, [N.C. Gen. Stat. § 50-13.2(b1)] is a special statute which applies in situations where the trial court is involved in an ongoing custody dispute and the grandparents intervene in the matter in order

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

to assert their right to visitation with the grandchildren.”) Under this statute, “[i]n order for a grandparent to initiate a proceeding for visitation, there must be an ongoing custody proceeding and the child’s family must not be an intact family.”⁴ *Perdue* at 586, 673 S.E.2d at 148. Plaintiffs did not allege a visitation claim under N.C. Gen. Stat. § 50-13.2(b1), but rather made a request for custody.

The final two statutes for custody or visitation, N.C. Gen. Stat. §§ 50-13.2A and -13.5(j), are inapplicable as this case does not involve adoption or a motion for a change of custody based upon a change in circumstances. *See Penland* at 361, 520 S.E.2d at 107 (AG.S. § 50-13.5(j) permits a grandparent to petition for custody or visitation due to changed circumstances in those actions where custody has previously been determined. . . . G.S. § 50-13.2A, permits a biological grandparent to institute an action for visitation rights where the minor child has been adopted by a step-parent or relative of the child, and a substantial relationship exists between the grandparents and the child.”).

Defendant contends that plaintiffs did not have standing because “they have not made any allegations regarding the nature of their relationship with the minor children and that the absence of any such allegations bars them from bringing a claim for custody of the children” pursuant to *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (1998). However, defendant’s reliance on *Ellison* is misplaced. *Ellison* involved a plaintiff, Ms. Ellison, who sued for custody of the child of Mr. Ramos, Ms. Ellison’s former “‘intimate companion[.]’” *Ellison* at 390-91, 502 S.E.2d at 892. Here, as distinguished from *Ellison*, the plaintiffs are biologically related to the children whose custody is being litigated. Furthermore, *Ellison* specifically limits its holding by

not[ing] that our decision does not encompass all potential situations of third party/natural parent custody disputes. In this respect, it may fall short of plaintiff’s apparent desire for us to establish a standing standard for all third party/natural parent custody cases. After due consideration, it would seem to us that at this time drawing a bright line for all such cases would be unwise. It may be that such a line should be drawn at some point in the future, after our courts have considered more cases in light of the *Petersen* and *Price* holdings, and we do not mean to fore-

4. A single parent (who is not separated or divorced from the children’s other parent) living with her children constitutes an intact family. *Fisher v. Gaydon*, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997).

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

close such action. However, given the relative newness of the application of the standing doctrine in this area, there are a potentially vast number of unexplored fact patterns which could underlie such cases. As a result, any rule crafted now would face a serious risk of stumbling upon unforeseen pitfalls. Because the potential consequences to a child's welfare would be exceptionally serious, we decline to draw a generic bright line test. Instead, *we confine our holding to an adjudication of the facts of the case before us: where a third party and a child have an established relationship in the nature of a parent-child relationship*, the third party does have standing as an other person under N.C. Gen. Stat. § 50-13.1(a) to seek custody.

Ellison at 395, 502 S.E.2d at 894-95 (emphasis added).

We thus conclude that plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that defendant had acted inconsistently with her parental status and was unfit because she had neglected the children. *See Eakett* at 553, 579 S.E.2d at 489. Therefore, the trial court properly denied defendant's motion to dismiss for lack of standing. This argument is overruled.

III. Acts Inconsistent with Parental Status

[3] Defendant next contends that "the trial court erred by concluding as a matter of law that the defendant acted inconsistently with her parental rights in that its conclusion is not adequately supported by its findings of fact." (Original in all caps.) "Whether . . . conduct constitutes conduct inconsistent with the parents' protected status presents a question of law and, thus, is reviewable *de novo*["] *Speagle v. Seitz*, 141 N.C. App. 534, 536, 541 S.E.2d 188, 190 (2000) (citation and quotation marks omitted), *reversed on other grounds*, 354 N.C. 525, 557 S.E.2d 83 (2001), *cert. denied*, 536 U.S. 923, 153 L. Ed. 2d 778 (2002).

Parents have a fundamental right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000). As long as a parent maintains his or her paramount interest, "a custody dispute with a non-parent regarding those children may not be determined by the application of the 'best interest of the child' standard." *Boseman v. Jarrell*, — N.C. —, —, 704 S.E.2d 494, 503 (2010) (citation omitted). However, the paramount status of parents may be lost "in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

constitutionally protected status.” *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005).

While “[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy[,]” other behavior can also rise to this level which must be considered on a case-by-case basis. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

When examining a legal parent’s conduct to determine whether it is inconsistent with his or her constitutionally-protected status, the focus is not on whether the conduct consists of good acts or bad acts. Rather, the gravamen of inconsistent acts is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.

Mason v. Dwindell, 190 N.C. App. 209, 228, 660 S.E.2d 58, 70 (2008) (quotation marks omitted).

Accordingly, relevant to the case-by-case determination to be made here are defendant’s “volitional acts” involved in the placement of her children with DSS. *Id.* In fact, “the specific question to be answered in cases such as this one is: ‘Did the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child?’ ” *Estroff v. Chatterjee* 190 N.C. App. 61, 69 660 S.E.2d 73, 78 (2008). “[I]n answering this question, it is appropriate to consider the legal parent’s intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.” *Id.*

Thus . . . the court’s focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. The parent’s intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent’s conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.

Id. at 70, 660 S.E.2d at 78-79. However, our Supreme Court has “recognize[d] that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody[.]” *Price* at 83, 484 S.E.2d at 537.

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

Yet in this case, defendant did not voluntarily choose to cede any parental authority to another party; DSS filed a juvenile petition and removed the children from her custody. Here, the trial court found in pertinent part:

13. That in February 2008 there was an incident, which was reported by a school nurse to the principal, that the minor child . . . had suffered some bruising. That, as a result of the same, the Brunswick County Department of Social Services was notified and a petition was drawn with one of the allegations being for dependency as defined by 7B-101(9) of the North Carolina General Statutes.

14. That, as a result of the same, the two (2) minor children were removed from the custody of the Defendant and placed in the legal and physical custody of the Brunswick County Department of Social Services

15. That on April 22, 2008 the two (2) minor children were adjudicated by clear, cogent and convincing evidence by a District Court Judge to be dependent juveniles in that their mother . . . was unable to provide for their care and supervision at that time due to emotional issues, which included relocation to North Carolina, the untimely traumatic death of the children's father, and some emotional issues related to physical abuse she received at her husband's hands.

16. That as a result of the adjudication both children were placed in the legal custody of the Brunswick County Department of Social Services.

As the trial court also found, the children were returned to the physical custody of defendant in July 2008.

While the trial court properly considered the juvenile court's adjudication order, a finding that defendant's children had been adjudicated dependent in an earlier proceeding is not alone sufficient to establish that defendant has acted in a manner inconsistent with her parental status. *See In re A.P.*, 179 N.C. App. 425, 427-28, 634 S.E.2d 561, 563 (2006) (noting that although the trial court "is permitted to receive into evidence and rely on prior court orders . . . [it] cannot abrogate its duty as the finder of ultimate facts and instead rely wholly on . . . previous orders"), *reversed per curiam on other grounds*, 361 N.C. 344, 643 S.E.2d 588 (2007). The trial court's findings of fact fail to indicate that defendant has voluntarily engaged in con-

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

duct that would trigger the forfeiture of her protected status; rather, they suggest quite the opposite. Specifically, the trial court noted that the dependency adjudication was based on defendant's inability to provide care based on emotional issues arising from her "relocation to North Carolina, the untimely traumatic death of the children's father, and some emotional issues related to physical abuse she received at her husband's hands." While at the time the juvenile petition was filed there were allegations of bruising on one of the children, neither the trial court's order nor the juvenile adjudication order made any findings of abuse or neglect. The trial court also found that following the juvenile adjudication order, defendant enrolled in private counseling, "has attempted to comply with the temporary orders" involved in this action, and has not "exposed [n]or is a danger to the children[.]"

The only additional findings of fact which could be construed as casting a negative light on defendant include: since her husband's death defendant and the children have lived in four different locations; defendant, at least once, had a "verbal disagreement" with plaintiffs' daughter which resulted in the police being called, and "[d]efendant is high-strung, easily angered and tends to allow her voice to rise as she becomes angry." But these additional findings of fact are not sufficient to show that defendant acted inconsistently with her status as a parent or that she is unfit as a parent. *See Rhodes v. Henderson*, 14 N.C. App. 404, 408, 188 S.E.2d 565, 567 (1972) (determining that use of profane vulgar language and frequent moving were not sufficient findings of fact to conclude that a parent should not have custody of his/her children). Therefore, where there are no further findings addressing defendant's intentions or acts affecting the parent-child relationship, *see Estroff* at 69-70, 660 S.E.2d at 78-79, and there is no finding that defendant is unfit, *see David N.* at 307, 608 S.E.2d at 753, the trial court erred in concluding that defendant had acted inconsistently with her parental status.

IV. Visitation

Defendant's next two arguments are regarding the trial court's award of visitation to the grandparents. As we have concluded that defendant did not act inconsistently with her status as a parent, and the trial court did not make a finding that defendant was unfit, there was no basis for the trial court to grant visitation to the plaintiffs. *See generally Troxel* at 66, 147 L. Ed. 2d at 57.

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

V. Conclusion

We conclude that plaintiffs had standing to bring a custody action regarding the children, but that the trial court erred in awarding plaintiffs visitation. Accordingly, we affirm the portion of the trial court order which denied defendant's motion to dismiss, and we reverse that portion of the trial court order which awarded plaintiffs visitation with the children.

AFFIRMED IN PART; REVERSED IN PART.

Judge BEASLEY concurs.

Judge BRYANT concurs in part and dissents in part in separate opinion.

BRYANT, Judge, concurring in part, dissenting in part.

I first note that the majority begins their analysis by addressing, *sua sponte*, whether the juvenile court terminated its exclusive jurisdiction by order of the court pursuant to N.C. Gen. Stat. § 7B-200(a) and 201(a). While the majority "stress[es] the need for the parties to include sufficient documentation in the record to demonstrate subject matter jurisdiction and the need for the juvenile courts to be mindful of the requirements of N.C. Gen. Stat. § 7B-201(a) when terminating juvenile court jurisdiction[.]" it concludes that the 4 August 2008 juvenile review order appropriately "terminated the jurisdiction of the juvenile court over the children as contemplated by N.C. Gen. Stat. § 7B-201(a)." Because this issue is not raised on appeal by either party and because this analysis does not affect the outcome of the appeal, I do not agree that it was necessary to address this issue *sua sponte*.

I concur with the portion of the majority opinion affirming the trial court's order that plaintiff grandparents had standing by noting that plaintiffs demonstrated a sufficient relationship with and interest in the children to proceed in an action for custody pursuant to N.C. Gen. Stat. 50-13.1(a). Accordingly, I agree with the majority that the trial court properly denied defendant's motion to dismiss plaintiffs' complaint for lack of standing.

However, as I disagree with the majority's conclusion that the trial court's findings of fact were not sufficient to address defendant's intentions or acts affecting the parent-child relationship, and there-

RODRIGUEZ v. RODRIGUEZ

[211 N.C. App. 267 (2011)]

fore, the trial court erred in concluding that defendant acted inconsistently with her protected parental status, I respectfully dissent.

“In a child custody case, the trial court’s findings of fact are binding on this Court if they are supported by competent evidence.” *Davis v. McMillian*, 152 N.C. App. 53, 58, 567 S.E.2d 159, 162 (2002) (citation omitted). “[A] trial court’s determination that a parent’s conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.” *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). However,

in custody cases, the trial court sees the parties in person and listens to all the witnesses. *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 902-03 (1998). This allows the trial court to “detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.” *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979), *quoted in Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903. Accordingly, the trial court’s findings of fact “‘are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.’” *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903[.]

Id.

Being mindful of the trial court’s superior position to observe the parties involved, a review of the record reveals the following: Following the death of the children’s father, defendant and her children moved to Las Vegas, Nevada in February 2007 and thereafter to Brunswick County. The dependency petition that brought the children to the attention of Brunswick County Department of Social Services was based on a school nurse reporting bruises on one of the children in February 2008. The dependency adjudication found that defendant “was unable to provide for [her children’s] care or supervision due to the emotional issues with which she and the children were dealing.” These issues “included relocation to North Carolina, the untimely and traumatic death of [defendant’s] husband, the father of her children, by suicide, and the trauma and emotional issues related to physical and mental abuse [defendant] reports she received at her husband’s hands.” The trial court also found that defendant is “high-strung, easily angered and tends to allow her voice to rise as she becomes angry.”

In addition, “conduct inconsistent with the parent’s protected status, which need not rise to the statutory level warranting termination of parental rights . . . would result in application of the ‘best interest of the child’ test[.]” *Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 86

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

(2001). In the case before us, the trial court found that defendant “ha[d] acted inconsistently with her constitutionally protected status as a parent[.]” Particularly, the court also found

17. . . . [t]hat the [p]laintiffs appeared to have a great relationship with the children.

. . .

32. [t]hat . . . it is in the best interests of the minor children that custody be placed and remain with [defendant,] with the [p]laintiffs being allowed visitation/secondary custody[.]”

33. [t]hat the [p]laintiffs are fit and proper persons to have the secondary custody in the form of visitational privileges, and it is in the best interests of the two (2) minor children . . . that the [p]laintiffs be awarded child visitational privileges.

Because there was competent evidence in the record, namely the previous adjudication and the trial court’s independent observation of defendant’s continued emotional issues, I believe that the trial court’s findings of fact adequately support its conclusion that defendant acted inconsistently with her protected parental status. Accordingly, I believe the trial court’s findings are conclusive on appeal and that there is no error. Such findings and conclusions do not give plaintiffs superior rights over these children, but it does allow plaintiffs, as paternal grandparents, to have visitation with their grandchildren. Therefore, I respectfully concur in part and dissent in part.

KENNETH HEATHERLY, EMPLOYEE, PLAINTIFF v. THE HOLLINGSWORTH COMPANY, INC., EMPLOYER, STONEWOOD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-994

(Filed 19 April 2011)

1. Workers’ Compensation— compensable injury—increased risk—lightning strike—expert testimony not required—findings and conclusions

The Industrial Commission did not err in a workers’ compensation case in finding and concluding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment. Plaintiff was not required to present expert

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

evidence to establish that his employment exposed him to an “increased risk” of being struck by lightning. The non-expert evidence supported the Commission’s findings which, in turn, supported the conclusion that plaintiff’s employment peculiarly exposed him to risk of injury from lightning greater than that of other persons in the community.

2. Workers’ Compensation— temporary total disability benefits—testimony sufficient

The Industrial Commission did not erroneously conclude in a workers’ compensation case that plaintiff was entitled to temporary total disability benefits for the period of 12 July 2004 to 2 January 2005. Plaintiff’s testimony regarding the pain in his fractured right hand and his inability to work at all was sufficient to support the Commission’s determination that plaintiff was temporarily totally disabled during the relevant period.

3. Workers’ Compensation— additional medical treatment— properly determined

The Industrial Commission properly determined that plaintiff was entitled to additional medical treatment reasonably related to his compensable hand injury.

Appeal by defendants from opinion and award entered 7 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2011.

Bazzle, Carr & Parce, P.A., by Ervin W. Bazzle, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Bambee B. Blake and Ginny P. Lanier, for defendants-appellants.

HUNTER, Robert C., Judge.

Defendant-employer The Hollingsworth Company, Inc. and defendant-carrier Stonewood Insurance Company appeal the Industrial Commission’s decision awarding plaintiff Kenneth Heatherly temporary total disability and medical benefits. After careful review, we affirm.

Factual and Procedural Background

The underlying facts regarding plaintiff’s injury and treatment are set out in greater detail in this Court’s prior opinion in this case. *See*

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

Heatherly v. Hollingsworth Co., 189 N.C. App. 398, 398-99, 658 S.E.2d 30, 31 (2008). Pertinent to this appeal, during July 2004, plaintiff was working as a framer and drywall hanger for his brother Randy Heatherly's construction company CDS Drywall. On 12 July 2004, plaintiff was working at a job site where a new house was being built on Ridge Mountain in Brevard. The job site was located "at or near the top of the mountain," near some metal towers. The house under construction had a metal roof and weather vanes had been attached to the top of the roof. Plaintiff and the rest of the construction crew set up their equipment in the unfinished garage, which did not have doors, and ran all of their electrical cords for their equipment from the garage to various locations around the house. That day, plaintiff was hanging drywall inside the house with his uncle Billy Cole Justice.

The construction crew stopped work early on 12 July 2004 due to inclement weather, including rain, thunder, and lightning. Plaintiff called his brother from a "landline" in the garage to inform him that the crew was finishing working for the day due to the weather. While making the call, plaintiff was standing inside the unfinished garage, with his left leg on the floor and his right leg propped up against the drywall, approximately five feet from the entrance to the garage and several feet from an electrical drop cord and the electrical outlet the crew used to power their equipment. Lightning was striking outside and sparks were "flying" from the drop cord. Plaintiff was struck by an "electrical charge or jolt from the lightning," throwing him backwards roughly eight feet through the air. As plaintiff landed, he struck his head, shoulders and right arm on the garage's concrete floor. Although he was "dazed and confused," plaintiff was conscious; plaintiff felt pain and a "burning sensation" in his right hand and left foot.

Mr. Justice drove plaintiff to Transylvania Community Hospital in Brevard, where he primarily complained of pain in his right hand and left foot. X-rays of plaintiff's right hand showed closed right fourth and fifth metacarpal fractures. Plaintiff was given morphine for the pain. Plaintiff's brother, who visited him in the hospital, noticed bruising and swelling to his right hand that had not been there the day before. Although plaintiff was referred to an orthopaedic surgeon for treatment of his hand fractures, plaintiff did not receive further treatment due to defendants' denial of his workers' compensation claim and his lack of health insurance. Plaintiff did not return to work until 3 January 2005.

After conducting a hearing on 28 January 2005, the deputy commissioner issued an opinion and award on 6 January 2006, in

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

which the deputy commissioner awarded plaintiff past and future medical benefits as well as temporary total disability benefits for the period of 12 July 2004 through 2 January 2005. Defendants appealed to the Full Commission, which affirmed the deputy commissioner's decision with minor modifications. On defendants' appeal to this Court, we determined that the Full Commission had erroneously applied the "positional risk" test rather than the "increased risk" test, as set out in *Pope v. Goodson*, 249 N.C. 690, 107 S.E.2d 524 (1959), in "reaching its ultimate conclusion of law that plaintiff's injury arose out of and in the course of his employment" *Heatherly*, 189 N.C. App. at 399, 658 S.E.2d at 31. Consequently, this Court "reverse[d] the Full Commission's opinion and award and remand[ed] the matter to the Full Commission to make new findings of fact and conclusions of law in accordance with the 'increased risk' principles set forth in *Pope*." *Id.* at 401, 658 S.E.2d at 32.

On remand, the Commission amended its opinion and award to include findings of fact and conclusions of law regarding whether plaintiff's employment exposed him to an "increased risk" of being struck by lightning. Specifically, the Commission concluded, based on its findings that "[t]he work conditions at the time of Plaintiff's injury [a]re consistent with several of the factors set forth in *Pope*," that plaintiff's "employment placed him at an increased risk of sustaining injuries due to lightning greater than members of the general public in that neighborhood, and therefore, the danger to which he was exposed was incident to his employment." The Commission, accordingly, awarded plaintiff temporary total disability benefits as well as past and future medical treatment. Defendants timely appealed to this Court.

Standard of Review

Appellate review of a decision by the Industrial Commission is limited to "reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission, as the fact-finding body, "is the sole judge of the credibility of the witnesses and the weight of the evidence, and its [factual] determination[s] [are] binding on appeal, if supported by competent evidence, even though the evidence might also support contrary findings." *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). The Commission's conclu-

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

sions of law, however, are reviewed de novo. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I

[1] Defendants first contend that “[t]he Industrial Commission erred in finding and concluding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment, as plaintiff failed to present expert evidence that his employment placed him at an increased risk of sustaining a lightning strike over the general public.” As our Supreme Court has explained, the Workers’ Compensation Act “does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as, in the course of employment.” *Bryan v. T.A. Loving Co.*, 222 N.C. 724, 728, 24 S.E.2d 751, 754 (1943); N.C. Gen. Stat. § 97-2(6) (2009). In lightning strike cases, “[t]he generally recognized rule is that where the injured employee is by reason of his [or her] employment peculiarly or specially exposed to risk of injury from lightning—that is, one greater than other persons in the community,—death or injury resulting from this source usually is compensable as an injury by accident arising out and in the course of the employment.” *Pope*, 249 N.C. at 692, 107 S.E.2d at 525-26.

“Whether an accident arose out of the employment is a mixed question of law and fact.” *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 197, 128 S.E.2d 218, 221 (1962). Whether an employee’s job exposed him or her to an increased risk of injury by accident is a question of law. *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 502, 358 S.E.2d 380, 382 (1987); *Heatherly*, 189 N.C. App. at 400, 658 S.E.2d at 31.

Defendants claim that the Supreme Court’s decision in *Pope* “clearly requires workers’ compensation claimants to present expert testimony that proves the requisite increased risk in lightning strike cases.” In *Pope*, 249 N.C. at 692-93, 107 S.E.2d at 526 (internal citation omitted), the Supreme Court exhaustively surveyed caselaw from the “courts of the land” in order to answer “the question of if and when an accidental injury or death due to a true Act of God in the form of a bolt of lightning arises ‘out of’ the employment” After summarizing numerous cases and their holdings, the *Pope* Court concluded:

[T]he great majority of the courts have reached the conclusion that the workman is entitled to compensation for injuries produced by lightning in all cases where he was subjected to a danger

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

from lightning greater than were the other people in the neighborhood; that is, Was the danger to which he was subjected one which was incident to the employment, or was it one to which other people, the public generally, in that neighborhood, were subjected?

Id. at 696, 107 S.E.2d at 528. The Court then applied the “increased risk” test, as articulated in lightning strike cases, to the facts of that case, holding:

The evidence shows that Pope, when killed by lightning, by reason of his employment had on wet clothes, and had tied around his waist a nail apron containing nails, and that these circumstances, incidental to his employment, peculiarly exposed him to risk of injury from lightning greater than that of other persons in the community. Such being the case his death is compensable under our Workmen’s Compensation Act as an injury by accident arising out of and in the course of his employment.

Id. at 698, 107 S.E.2d at 529-30.

We do not believe, as defendants suggest, that “*Pope* confirms the requirement of expert testimony.” As defendants acknowledge, *Pope* involved expert testimony regarding “the effect lightning might have and its behavior.” *Id.* at 697, 107 S.E.2d at 529. Consequently, as the Court held that the *evidence presented in that case*, which consisted of expert testimony, was sufficient to support the Commission’s determination that the employee’s job exposed him to an increased risk of injury by lightning, the existence of the expert evidence obviated the need for the Court to determine—and it did not determine—whether expert evidence is, in fact, required.

Defendants nonetheless point out that the *Pope* Court cites as “support[ing] [its] position,” *id.* at 696, 107 S.E.2d at 528, the Indiana Supreme Court’s decision in *E. I. Du Pont De Nemours Co. v. Lilly*, 226 Ind. 267, 272-73, 79 N.E.2d 387, 389 (1948), where the court upheld the industrial board’s determination that the employee’s death from being struck by lightning arose out his employment based on expert evidence “that the risk or hazard was increased; [and] that the [employee] was more exposed to injury by lightning than others in the same locality and not so engaged[.]” Defendants’ isolated focus on *Pope*’s reference to *E. I. Du Pont De Nemours Co.* ignores the fact that *Pope* also cited to at least six cases in which the employees’ jobs were held to expose them to an increased risk of lightning injuries

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

despite no expert evidence being presented on the issue. *See Truck Ins. Exch. v. Indus. Acc. Comm'n*, 77 Cal. App. 2d 461, 466, 175 P.2d 884 (1946) ("The [industrial accident commission's] implied finding that there is increased danger from lightning to one who is standing upon the wet roof of a building during a storm is in accordance with common knowledge and requires no supporting expert testimony."); *Chiulla de Luca v. Bd. of Park Com'rs*, 94 Conn. 7, 10, 107 A. 611, 612 (1919) (holding that compensation commission, in determining whether decedent's employment exposed him to an increased risk of injury by lightning, could take judicial notice of "scientific authority" establishing that "there is greater danger [of being struck by lightning] under a tall tree in a thunder-shower"); *Bauer's Case*, 314 Mass. 4, 6, 49 N.E.2d 118, 120 (1943) ("Certain facts as to the operation of lightning have become matters of common knowledge, of which judicial notice may be taken. We think that it could have been found, without expert evidence, that a person in wet clothes, standing close to an iron bed and near to an electric light and electric wiring, in a building on the top of an exposed hill, was in a position of unusual danger from lightning." (internal citations omitted)); *Buhrkuhl v. F. T. O'Dell Const. Co.*, 232 Mo. App. 967, 972, 95 S.W.2d 843, 846 (Mo. Ct. App. 1937) (finding "no serious doubt" that "there was sufficient competent evidence to show that [the decedent's] employment had brought about an excessive exposure to the lightning which killed him," despite the fact that the claimant "introduced not a word of expert evidence regarding the characteristics and propensities of lightning or atmospheric electricity," where the evidence showed that the comparative height of the barn in which the decedent took shelter during storm "exposed [him] to a risk and danger from lightning greater than that confronting the neighborhood generally"); *Consolidated Pipe Line Co. v. Mahon*, 152 Okla. 72, 77, 3 P.2d 844, 850 (1931) (holding industrial commission could properly take judicial notice of "generally known" principle that a dilapidated frame house without doors or windows, containing metal, and surrounded by metal fencing, such as the one decedent took refuge in during storm, "is much more liable to be struck by lightning . . . than the average house in the same locality"); *Nebraska Seed Co. v. Indus. Comm'n*, 206 Wis. 199, 201, 239 N.W. 432, 433 (1931) (affirming industrial commission's determination, without expert evidence, that "[t]he building into which [the employee] entered was so situated, and its height above the surrounding surface was such, as to increase the danger from lightning" and that "[i]t all resulted in an unusual risk of such an accident incidental to the employment").

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

We find it unreasonable to read *Pope* as standing for the proposition that expert evidence is mandated in all workers compensation cases to establish an increased risk of lightning strike injury when the majority of the cases relied upon by the Court in articulating its holding concluded that non-expert evidence was competent to support a determination on that issue. *See Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986) (explaining that judicial decisions “must be interpreted like other written documents, not by focusing on isolated parts, but as a whole”). Indeed, in one of the few instances in which the *Pope* Court directly quoted another appellate court, our Supreme Court observed:

The [Supreme Judicial Court of Massachusetts] closed its opinion with these words: “We think that it could have been found, *without expert evidence*, that a person in wet clothes, standing close to an iron bed and near to an electric light and electric wiring, in a building on the top of an exposed hill, was in a position of unusual danger from lightning.”

Pope, 249 N.C. at 695, 107 S.E.2d at 527 (quoting *Bauer’s Case*, 314 Mass. at 6, 49 N.E.2d at 120) (emphasis added).

The cases relied upon by the Supreme Court in *Pope* in reaching its conclusion set out “specific work-related factors within the job description or environment of the injured employee,” 1 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 5.01[4] (2009) [hereinafter *Larson’s*], such as “height above the surrounding area, nearness to trees or tall structures, nearness to metallic objects likely to attract lightning, or presence of wetness and other conditions facilitating transmission of lightning,” that “enhanced the probability of injury from lightning[,]” *Larson’s* § 5.01[1]. *See, e.g., Truck Ins. Exch.*, 77 Cal. App. 2d at 464, 175 P.2d at 886 (finding certain “facts” to be “common knowledge” and thus properly judicially noticed: that “a person standing upon a wet surface is more susceptible to electric shock than one who stands upon a dry surface; that as between a short gap and a long one in its path, an electric force is more likely to jump the short one, and hence, where atmospheric conditions are such that an electric force is about to be discharged toward the earth, an object which projects above the surrounding surface and is closest to the point of discharge and which is a ready conductor of electrical energy will be the one most likely to receive it”); *Chiulla de Luca*, 94 Conn. at 10, 107 A. at 612 (concluding that compensation commissioner could take judicial notice of fact that

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

“there is greater danger [of being struck by lightning] under a tall tree in a thunder shower than in other places”); *Bauer’s Case*, 314 Mass. at 6, 49 N.E.2d at 120 (taking judicial notice of “common knowledge” that “a person in wet clothes, standing close to an iron bed and near to an electric light and electric wiring, in a building on the top of an exposed hill, [i]s in a position of unusual danger from lightning”); *Buhrkuhl*, 232 Mo. App. at 972, 95 S.W.2d at 846 (taking judicial notice of fact that isolated location and comparative height of barn in which employee took shelter “render[ed] it more likely to be struck by lightning than the ordinary object in that vicinity”); *Consolidated Pipe Line Co.*, 152 Okla. at 80, 3 P.2d at 852 (considering it a “matter of common knowledge” that a “dilapidated house” without windows or doors, containing metal, and surrounded by metal fencing is “much more liable to be struck by lightning . . . than the average house in the same locality”); *Nebraska Seed Co.*, 206 Wis. at 200-01, 239 N.W. at 432-33 (recognizing that “lightning is more apt to strike at higher elevations, such as the building into which [employee] took his team for shelter”).

Rather than requiring expert evidence in each and every lightning strike case, we read *Pope* as sanctioning the use of non-expert evidence regarding case-specific “work-related factors” to support a determination that an employee’s job exposed him or her to an increased risk of being struck by lightning. Our conclusion is reinforced by one of the leading workers’ compensation commentators, who explains that, “in jurisdictions adhering to the increased-risk test, the parties would ordinarily do well *either* to arm themselves with the testimony of electrical experts *or be prepared to show an increased risk that arises from specific work-related factors within the job description or environment of the injured worker.*” *Larson’s* § 5.01[4] (emphasis added). In “close cases,” where “experts may differ” or where there are “no special circumstances associated with the duties of the worker that can be shown to have increased his or her risk,” expert evidence may be warranted to “do justice to [the parties’] case” *Larson’s* § 5.01[4]. We, however, decline to establish a “bright-line” rule requiring expert evidence in every workers’ compensation case in order to establish that the employee’s job exposed him or her to an increased risk of a lightning strike injury. Such a requirement would undermine the well-established principle that the Workers’ Compensation Act “must be liberally construed to accomplish the humane purpose for which it was passed, *i.e.*, compensation for injured employees.” *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966), *overruled in part on other grounds by*

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

Derebery v. Pitt County Fire Marshall, 318 N.C. 192, 347 S.E.2d 814 (1986); see also *Consolidated Pipe Line Co.*, 152 Okla. at 74, 3 P.2d at 846 (“The courts have uniformly construed the words ‘out of the employment’ liberally and with a view to extending the scope of a remedial statute.”).

Here, the Commission made numerous findings with respect to the relevant “work-related” factors set out in *Pope*: that plaintiff was working at a home construction site “locat[ed] at or near the top of [a] mountain, near some metal towers”; that the unfinished house “had a metal roof and weather vanes on top of the roof”; and, that plaintiff, at the time of the lightning strike, was standing in the “unfinished garage, which did not have doors on it,” several feet away from an electrical drop cord and other metal or electrically charged objects. Based on these findings, the Commission concluded that “[t]he work conditions at the time of Plaintiff’s injury [a]re consistent with several of the factors set forth in *Pope*, and the cases cited therein, as relevant to a finding of compensability under the ‘increased risk’ test in cases involving work-related injuries due to lightning strikes”:

Because Plaintiff was working at a high elevation that had a metal roof and an unfinished garage with no doors, and he was near metal and electrically charged objects such as the electrical drop cord and other tools and equipment used in furtherance of his work, his employment placed him at an increased risk of sustaining injuries due to lightning greater than members of the general public in that neighborhood, and therefore, the danger to which he was exposed was incident to his employment.

Aside from arguing that plaintiff was required to present expert evidence to establish that his employment exposed him to an “increased risk” of being struck by lightning, defendants do not challenge the sufficiency of the evidence to support the Commission’s findings of fact or conclusions of law. In any event, we conclude that the non-expert evidence in this case, particularly plaintiff’s testimony and the testimony of his uncle, Mr. Justice, describing the physical characteristics of the jobsite, supports the Commission’s findings. The Commission’s findings, in turn, support the conclusion that “circumstances, incidental to [plaintiff’s] employment, peculiarly exposed him to risk of injury from lightning greater than that of other persons in the community.” *Pope*, 249 N.C. at 698, 107 S.E.2d at 529-30. Defendants’ argument is overruled.

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

II

[2] Defendants next contend that plaintiff failed to satisfy his burden of proving disability for the period of 12 July 2004 through 2 January 2005, and thus the Commission erroneously concluded that plaintiff is entitled to temporary total disability benefits for this period. It is well established that the “claimant ordinarily has the burden of proving both the existence and degree of disability.” *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 440, 342 S.E.2d 798, 807 (1986). “[I]n order to support a conclusion of disability, the Commission must find: (1) that [the] plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that [the] plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual’s incapacity to earn was caused by [the] plaintiff’s injury.” *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff may establish the first two elements through any one of four methods of proof:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

On the issue of disability, the Commission found:

7. [Plaintiff’s uncle] took Plaintiff to Transylvania Community Hospital in Brevard, North Carolina, where he received treatment for a possible lightning strike injury. Plaintiff’s chief complaints were pain in his right hand and left foot. X-rays of his right hand revealed closed right fourth (4th) and fifth (5th) metacarpal fractures. Plaintiff received morphine for pain. Plaintiff’s brother visited him in the hospital, where he observed that Plaintiff’s right hand had bruising and swelling that was not there the day before.

8. Although Plaintiff received a referral to an orthopaedic surgeon for further treatment of his right hand fractures, he did not

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

receive this treatment, due to the denial of his workers' compensation claim, and his lack of health insurance. Plaintiff did not receive any further treatment for his fractures, and was unable to earn wages in any employment from July 12, 2004 until he returned to work on January 3, 2005.

Based on these findings, the Commission concluded that, "[d]ue to Plaintiff's hand fractures and the lack of medical treatment needed to effect a cure, to give relief, and/or lessen his period of disability, Plaintiff was unable to return to his regular job hanging sheetrock, and his physical limitations resulting from his July 12, 2004 work injury impeded his ability to work or to find suitable work."

Defendants contend that because plaintiff failed to "produce *medical* evidence that he [wa]s physically or mentally unable to work in *any* employment as a result of his work-related injury," the Commission erred in concluding that plaintiff had established temporary total disability under *Russell's* first prong. In determining if a plaintiff has met the burden of proving loss of wage earning capacity under *Russell's* first prong, "the Commission must consider not only the plaintiff's physical limitations, but also [plaintiff's] testimony as to his pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000), *cert. denied*, 353 N.C. 398, 548 S.E.2d 159 (2001). "[M]edical evidence that a plaintiff suffers from genuine pain as a result of a physical injury, combined with the plaintiff's own credible testimony that [the] pain is so severe that [the plaintiff] is unable to work, may be sufficient to support a conclusion of total disability by the Commission." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 8, 562 S.E.2d 434, 440 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003).

Here, the medical records indicate that when plaintiff was seen in Transylvania Community Hospital's emergency department immediately after the accident on 12 July 2004, he complained of pain in his right hand and left foot. His right hand was swollen and X-rays of plaintiff's hand showed closed right fourth and fifth metacarpal fractures. Plaintiff was initially given morphine for the pain, his right hand was placed in a splint, and he was discharged with a prescription of Percocet. Three days later, on 15 July 2004, Dr. G. Ruffin Benton, III, with Medical Associates of Transylvania, P.A., saw plaintiff for a follow-up, and plaintiff continued to complain that his right hand "hurt[.]" Dr. Benton refilled the prescription for Percocet and referred plaintiff to an orthopaedic surgeon for an evaluation of his right hand. In addi-

HEATHERLY v. THE HOLLINGSWORTH CO., INC.

[211 N.C. App. 282 (2011)]

tion to the medical evidence regarding the pain in plaintiff's fractured right hand, plaintiff testified that his right hand "hurt[] bad" and that he was "unable to work at all" from 12 July 2004 to 2 January 2005.

This Court, moreover, has held that a plaintiff's testimony regarding his or her pain and its effect on the plaintiff's ability to work is sufficient to support a determination of disability under *Russell's* first method of proof. See *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 265-66, 423 S.E.2d 532, 536 (1992) ("[T]he Commission, in its proper role as sole judge of the credibility of witnesses, found [plaintiff's] testimony that he was unable to work due to pain more credible than the expert testimony that [plaintiff] was capable of performing medium to light work."); see also *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002) ("This Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work."); *Knight*, 149 N.C. App. at 8, 562 S.E.2d at 440 (concluding that employee's testimony that "the pain in his lower back and left leg is so severe that, not only is he unable to work in any employment, he is often unable to undertake even simple chores, such as sweeping, for more than thirty minutes" was competent evidence supporting Commission's finding of disability under *Russell's* first prong); *Niple v. Seawell Realty & Insurance Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987) (holding employee's own testimony regarding pain resulting from "physical exertion" was competent evidence regarding her "ability to engage in any activity"), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988). Expert evidence is thus not required under *Russell's* first prong. See *Matthews*, 108 N.C. App. at 265, 423 S.E.2d at 536 ("[Plaintiff's] testimony is competent evidence as to his ability to work, and the Commission chose to believe him."). Plaintiff's testimony regarding the pain in his fractured right hand and his inability to "work at all" is sufficient to support the Commission's determination that plaintiff was temporarily totally disabled during the period of 12 July 2004 to 2 January 2005. Defendants' argument is overruled.

III

[3] Defendants' final argument on appeal is that the Commission erred in concluding that, "[a]s a result of Plaintiff's July 12, 2004 work injury, Defendants are responsible for providing all reasonably necessary medical treatment for his injuries." "Subsequent to the establishment of a compensable injury under the Workers' Compensation Act, an employee may seek compensation under N.C.G.S. § 97-25 for additional medical treatment when such treatment lessens the period

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

of disability, effects a cure, or gives relief.” *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 182, 565 S.E.2d 209, 216 (2002); N.C. Gen. Stat. § 97-25 (2009).

Defendants point to plaintiff’s testimony that, at the time he returned to work on 3 January 2005, he was able to use his right hand “pretty good.” Defendants claim that this evidence “proves that plaintiff’s hand has improved and that additional treatment is not necessary.” Defendants’ contention ignores competent evidence establishing that plaintiff’s hand was x-rayed immediately after the accident, revealing closed right fourth and fifth metacarpal fractures, and that plaintiff was referred to an orthopaedic surgeon for evaluation of his hand, but was not seen because defendants denied plaintiff’s workers’ compensation claim and plaintiff did not have health insurance. Plaintiff testified that he had not been seen by “any medical personnel” since 15 July 2004 and that his hand had not been “fixed.” Without, at the very least, the orthopaedic evaluation ordered by Dr. Benton, it cannot be determined whether the fractures in plaintiff’s right hand have properly healed. We thus conclude that the Commission properly determined that plaintiff is entitled to additional medical treatment reasonably related to his compensable hand injury.

Affirmed.

Chief Judge MARTIN and Judge THIGPEN concur.

CHASE DEVELOPMENT GROUP, PTIA LIMITED PARTNERSHIP; CHASE GROUP, INC., D/B/A CHASE GROUP-MARYLAND; JOHN JORGENSEN; AND MICHAEL MELLOR, PLAINTIFFS v. FISHER, CLINARD & CORNWELL, PLLC, AND ROBERT LEFKOWITZ, DEFENDANTS

No. COA09-1521

(Filed 19 April 2011)

1. Negligence— professional negligence—findings of fact—burden of proof—denial of involuntary dismissal motion

The trial court did not err in a professional negligence case by denying defendants’ motion for involuntary dismissal. The key findings of fact challenged by defendants were supported by evidence in the record and the court applied the correct burden of proof to the critical finding of fact.

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

2. Statutes of Limitation and Repose— professional negligence—claims not barred

The trial court did not err in a professional negligence case by denying defendants' motion for involuntary dismissal. The trial court correctly determined that a portion of plaintiffs' claims were not barred by the applicable statute of limitations.

3. Statutes of Limitation and Repose— professional negligence—claims barred

The trial court in a professional negligence case did not err by concluding that a portion of plaintiffs' claims were barred by the applicable statute of limitations. The trial court's findings of fact supported its conclusions of law that claims against defendants for legal malpractice during the period October 2003 through April 2004 were barred by the three-year statute of limitations; individual defendant's renewed representation on the same matter as he previously advised did not halt the running of the statute; and when defendants did not represent plaintiffs individually, there was no reasonable third-party reliance.

4. Attorney Fees— professional negligence—findings of fact—supported award

The trial court did not err in a professional negligence case by not including an additional \$62,202.84 over and above the amount ordered by the trial court that was paid by plaintiffs individually as part of a \$300,000 settlement. The findings supported the amount of the trial court's award to plaintiffs individually.

Appeals by plaintiffs and defendants from judgment filed 28 May 2009 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 26 May 2010.

Jackson & McGee, LLP, by Gary W. Jackson and Sam McGee, for plaintiffs.

Poyner Spruill LLP, by Cynthia L. Van Horne, E. Fitzgerald Parnell, III, and Andrew H. Erteschik, for defendants.

STEELMAN, Judge.

The trial court's findings of fact support its denial of defendants' motion for involuntary dismissal. When the defendants' last act of negligence occurred is a factual issue to be decided by the trial court. The trial court's findings of fact on this issue support its ruling that a

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

portion of Jorgenson and Mellor's claims were barred by the three-year statute of limitations, and that a portion of these claims were not barred. It was for the trial court to determine what amount of plaintiffs' damages were proximately caused by the negligence of defendants.

I. Factual and Procedural Background¹

In 1997, Chase Development Group–PTIA, Limited Partnership (“Chase NC”) acquired a tract of real property located in Guilford County, North Carolina, upon which it operated a Biltmore Suites Hotel (“the Property”). Chase Group, Inc. d/b/a Chase Group–Maryland (“Chase MD”) was the general partner of Chase NC. John Jorgenson (“Jorgenson”) was the Vice-President of Chase MD. Michael Mellor (“Mellor”) was the President of Chase MD. Jorgenson and Mellor were the beneficial owners of Chase NC and Chase MD.

In August of 1999, Chase NC entered into a loan agreement with Bank of America, N.A. (“Lender”). The loan was evidenced by a note and secured by a deed of trust on the Property, an assignment of leases and rents, a security agreement, and a fixture filing. Jorgenson and Mellor were designated as “Borrower Principals” under the loan agreement. They did not personally guarantee the repayment of the loan. However, the loan agreement contained certain “recourse covenants” which triggered the personal liability of Jorgenson and Mellor. Specifically, paragraph 8(b) provided that Chase NC, Jorgenson, and Mellor were jointly and severally liable for “the Lender’s incurrence of or obligation to pay attorney’s fees, costs, and expenses in any bankruptcy, receivership or similar case filed by or against the Borrower or any Borrower Principal. . . .” One of the recourse covenants, set forth in Section 5.4(b) of the loan, also contained a prohibition against Chase NC procuring any other financing on the Property without Lender’s prior written consent.

On 24 January 2002, Chase NC established a line of credit with First Union National Bank (“Credit Line”). Jorgenson and Mellor steadfastly maintained that the Lender had full knowledge of the Credit Line.

Prior to 2003, the Lender sold the note to an unidentified entity (“the Note Holder”). The loan was serviced and administered by GMAC Commercial Mortgage Corporation (“GMAC”). Following the events of 11 September 2001, the occupancy rates for the Property

1. The factual background is from the findings of fact contained in the trial court’s final judgment of 28 May 2009.

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

dropped. In early 2003, Chase NC stopped making payments on the loan. Jorgenson and Mellor entered into negotiations with Allan Hanson ("Hanson") of GMAC, the objective of which was to resolve the loan default while retaining the Property. There were discussions of Chase NC tendering a deed in lieu of foreclosure to the Note Holder in exchange for a full release of liability for Chase NC, Jorgenson, and Mellor. GMAC and the Note Holder would have accepted such a settlement in the fall of 2003.

In October 2003, when it appeared that it could not reach an agreement with Hanson that would allow it to keep the Property, Chase NC consulted with the law firm of Fisher, Clinard & Cornwell, PLLC ("Fisher Clinard") and specifically with Robert Lefkowitz ("Lefkowitz") (collectively "defendants"), an expert in bankruptcy law. Fisher Clinard commenced representation of Chase NC with respect to its default under the loan. Lefkowitz advised Chase NC through Jorgenson and Mellor not to tender a deed in lieu of foreclosure, but to keep its options open. At this point, Jorgenson and Mellor reasonably believed that Fisher Clinard represented them individually as well as Chase NC. Lefkowitz did not discuss with Jorgenson and Mellor the possibility of their personal liability for attorneys' fees if foreclosure, receivership, or bankruptcy was initiated.

Based upon advice of defendants, Chase NC elected not to tender a deed in lieu of foreclosure, and communicated this decision to Hanson. On 7 November 2003, GMAC filed suit in the Superior Court of Guilford County ("state court action") against Chase NC. As a result of this suit a receiver was appointed for Chase NC, who shortly thereafter took over the operation of the Property. On 22 December 2003, GMAC filed an amended complaint, seeking to recover from Jorgenson and Mellor as "Borrower Principals" all amounts due under the note and loan documents, including attorneys' fees. The amended complaint asserted that the Credit Line was a violation of the recourse covenant.

Lefkowitz advised Jorgenson and Mellor that GMAC did not have a strong argument for recovery of attorneys' fees from them personally. Lefkowitz advised counsel for GMAC that he did not represent Jorgenson or Mellor and declined to accept service on their behalf. Negotiations for resolution of the dispute continued between counsel and between Jorgenson, Mellor, and Hanson.

Immediately prior to a hearing on GMAC's motion for a preliminary injunction in the state court action, Fisher Clinard filed a peti-

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

tion under Chapter 11 of the United States Bankruptcy Code on behalf of Chase NC, on 15 April 2004. With the filing of the bankruptcy it was clear to all parties that Fisher Clinard only represented Chase NC, and did not represent Jorgenson or Mellor individually. In June of 2004, a settlement proposal that would have allowed Chase NC to retain the Property was rejected by the Note Holder. On 19 January 2005, the Bankruptcy Court refused to approve Chase NC's plan of reorganization. On 22 April 2005, the Bankruptcy Court dismissed the bankruptcy petition. GMAC then instituted foreclosure on the Property.

On 9 May 2005, Lefkowitz filed answer in the state court action to GMAC's amended complaint on behalf of Jorgenson and Mellor, individually. On 14 November 2005, GMAC filed a motion for partial summary judgment seeking a ruling on Jorgenson and Mellor's personal liability for GMAC's attorneys' fees. On 17 January 2006, the trial court granted GMAC's motion and awarded GMAC accrued attorneys' fees against Jorgenson and Mellor of \$237,797.16. Lefkowitz recommended appeal of this order. Jorgenson and Mellor sought other legal advice and hired Andrew Chamberlin to represent them.

Jorgenson and Mellor negotiated a settlement with GMAC and the Note Holder. Under the terms of the settlement, Chase NC relinquished title to the Property; Jorgenson and Mellor paid GMAC \$300,000 (which included the \$237,797.16 previously awarded by the trial court); and the Note Holder released Chase NC, Jorgenson, and Mellor from any further liability.

On 6 November 2007, Chase NC, Chase MD, Jorgenson, and Mellor ("plaintiffs") filed this action against defendants seeking compensatory damages for negligence arising out of the representation of plaintiffs. Defendants pled the statute of limitations in bar of plaintiffs' claims. The case was heard before the trial court sitting without a jury. A judgment containing detailed findings of fact and conclusions of law was entered on 28 May 2009.

The judgment found that defendants had breached the applicable standard of care, and that Chase NC was entitled to recover of defendants the sum of \$50,000, the amount paid to defendants in fees and costs. As to Jorgenson and Mellor, the court found that there were two periods of legal representation by defendants: (1) from October 2003 until 15 April 2004 (the date of filing bankruptcy on behalf of Chase NC); and (2) from the dismissal of the bankruptcy petition until the dismissal of the state court case (14 March 2006). As to the first period of representation, the trial court held that the claims of

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

Jorgenson and Mellor were barred by the three-year statute of limitations. As to the second period of representation, the trial court awarded damages to Jorgenson and Mellor of \$48,720.16. Costs and interest from the date of filing the lawsuit were also awarded to plaintiffs.

From the judgment of the trial court, both plaintiffs and defendants appeal.

II. Standard of Review

“It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). The trial court’s findings of fact are conclusive on appeal if supported by competent evidence. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003) (quotation omitted). “Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980) (citation omitted).

III. Appeal of Defendants

A. Sufficiency of the Evidence

[1] In their first argument, defendants contend that the trial court erred in denying their motion for a directed verdict. We disagree.

This case was tried before a judge, sitting without a jury. A motion for directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure was not the appropriate mechanism to challenge the sufficiency of plaintiffs’ evidence. Rather, the correct motion was one for involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure that based “‘upon the facts and the law the plaintiff has shown no right to relief.’” *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 799-800 (1999) (quoting *Kelly v. Harvester Co.*, 278 N.C. 153, 159, 179 S.E.2d 396, 398 (1971)).

The test of whether dismissal is proper under Rule 41(b) differs from the test of whether dismissal is proper for directed verdict under Rule 50(a). *Neff v. Coach Co.*, 16 N.C. App. 466, 470, 192 S.E.2d 587, 590 (1972). On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. *Dealers Specialties, Inc. v. Housing Services*,

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Instead, “the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him.” *Id.* The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them. *Bridge Co. v. Highway Comm.*, 30 N.C. App. 535, 544, 227 S.E.2d 648, 653-54 (1976).

A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits. *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 660, 301 S.E.2d 523, 527, *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983).

Hill, 135 N.C. App. at 517, 520 S.E.2d at 800.

Given the nature of appellate review of non-jury cases set forth above, our review is essentially whether there was evidence to support the trial court’s findings of fact. We treat defendants’ motion to dismiss as a motion for involuntary dismissal pursuant to Rule 41(b), and review the evidence in the record to determine whether it supports the key findings of fact challenged by defendants on appeal.

The trial court found that:

20. In the fall of 2003, GMAC and the Note Holder would have accepted a deed in lieu of foreclosure from Chase-NC and would have given Chase-NC, Mr. Mellor, and Mr. Jorgenson a release in exchange. This deed in lieu of foreclosure would have entailed a relinquishment of the property by Chase-NC in exchange for a full release of all liability for Chase-NC, Mr. Mellor, and Mr. Jorgenson.

....

71. \$300,000.00 was paid to GMAC by Mr. Mellor or Mr. Jorgenson personally.
72. The settlement agreement required the approval of the Note Holder. The Note Holder approved the settlement.
73. This settlement was materially the same as was offered in October of 2003, in that the property was relinquished in exchange for a full release of all liability, except that the Plaintiffs additionally reimbursed GMAC for its fees and

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

expenses incurred in the receivership, bankruptcy and foreclosure, largely after October 2003.

74. The dispute could have been resolved in October 2003 for a deed in lieu of foreclosure with a full release of all plaintiffs. The circumstantial evidence indicates that it more likely than not thereafter could have been resolved at almost any point for a deed in lieu of foreclosure or an uncontested foreclosure with a full release of all plaintiffs if plaintiffs paid GMAC's attorneys' fees incurred to date, and the Court so finds. Had the Plaintiffs been adequately advised, it is more likely than not that they would have chosen to resolve the case on those terms rather than pursuing the course recommended by Mr. Lefkowitz, and the Court so finds.

Defendants argue that while there was discussion of Chase NC tendering a deed in lieu of foreclosure in the fall of 2003, that it was mere speculation that the Note Holder would have accepted a settlement on that basis. Any settlement proposal would have to have been agreed upon among Jorgenson, Mellor, and Hanson. It then would have to be submitted and approved by GMAC's investment committee. Once these approvals were attained, it would then have been submitted to the Note Holder for final approval. Defendants assert that since none of these approvals were actually obtained, whether the Note Holder would have approved such a settlement was pure speculation. They also point to the fact that the Note Holder rejected a settlement recommended by GMAC during the pendency of the bankruptcy.

We note that in a non-jury trial, the judge also assumes the role of the jury. The judge determines the credibility of the witnesses and other evidence, and also determines the weight to be given to each piece of evidence. *Laughter v. Lambert*, 11 N.C. App. 133, 136, 180 S.E.2d 450, 452 (1971). On appeal, if there is evidence in the record to support a finding of fact, it is binding upon the appellate court. *Lake Gaston Estates Prop. Owners Ass'n v. County of Warren*, 186 N.C. App. 606, 610, 652 S.E.2d 671, 673 (2007) (quotation omitted). In the instant case, there was sharply conflicting evidence. The fact that there was conflicting evidence does not mean that a particular finding of fact was not supported by the evidence.

Hanson testified that he was "99.9 percent certain" that his recommendation to resolve the dispute by a deed in lieu of foreclosure would have been accepted by the Note Holder in 2003. This resolu-

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

tion would have included a full release of Chase NC, Jorgenson, and Mellor from any additional liability. Jorgenson and Mellor would not have been exposed to liability for GMAC's attorneys' fees.

The court also found that the fall 2003 settlement and the final 2006 settlement were "materially the same" in that the Property was conveyed by Chase NC, and GMAC's fees and expenses were reimbursed by Jorgenson and Mellor. The fees and expenses were incurred by GMAC after October of 2003 as a result of the state court and federal bankruptcy case litigation. The settlement proposal that was rejected by the Note Holder did not include a conveyance by Chase NC of the Property. It is clear from the course of the negotiations that the Note Holder would not agree to any settlement that left the Property under the control of Chase NC. The rejection of the settlement by the Note Holder during the course of the bankruptcy supports the trial court's findings rather than contradicting them.

Finally, we note that this was a civil case. Therefore, the plaintiffs' burden of proof was "by the greater weight of the evidence." *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 249 (2005), *cert. denied*, 360 N.C. 367, 630 S.E.2d 454 (2006). The trial court recognized this by finding that the evidence established that "more likely than not" a deed in lieu of foreclosure would have been accepted with a full release of all plaintiffs at any point after October 2003 if plaintiffs paid GMAC's attorneys' fees incurred to date. "More likely than not" is language that is frequently found in cases involving issues of medical causation. This language is used to explain the meaning of "by the greater weight of the evidence" to juries in the North Carolina Pattern Jury Instructions. N.C.P.I.—Civ. 101.10 ("The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.").

We hold that the trial court's findings on this issue are supported by evidence in the record, and are thus binding upon this Court. The trial court applied the correct burden of proof as to this critical finding of fact. The trial court did not err in holding that plaintiffs were damaged by the negligence of defendants.

This argument is without merit.

B. Statute of Limitations

[2] In their second argument, defendants contend that the trial court erred in denying their motion for a directed verdict when the last act

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

of any alleged negligence occurred outside of the applicable statute of limitations. We disagree.

We treat defendants' motion for directed verdict as a motion for involuntary dismissal pursuant to Rule 41(b) of the Rules of Civil Procedure.

When a defendant pleads the statute of limitations in bar of a plaintiff's claim, the burden is upon the plaintiff to show that its suit was commenced within the appropriate time from the accrual of the cause of action. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). In this case, based upon allegations of professional negligence, the applicable statute of limitations was three years, pursuant to N.C. Gen. Stat. § 1-15(c) (2007).²

In a legal malpractice action, the limitations period begins to run when the last act of negligence occurs. *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994). Continuing representation of a client by an attorney following the last act of negligence does not extend the statute of limitations. *See Carlisle v. Keith*, 169 N.C. App. 674, 684, 614 S.E.2d 542, 549 (2005) (citation omitted). Defendants argue that the last acts which could have caused damage to the plaintiffs were in October 2003 when Lefkowitz advised Chase NC not to give a deed in lieu of foreclosure or in April of 2004 when Lefkowitz filed the bankruptcy petition on behalf of Chase NC, triggering the liability of Jorgenson and Mellor for attorneys' fees under the recourse covenants. This action was filed on 6 November 2007, more than three years following each of these dates.

However, the judgment of the trial court focused on defendants' representation following the dismissal of the bankruptcy petition. In conclusion of law 4(e), the trial court held:

From April 22, 2005, until the dismissal of the state court action, Defendants failed to fully advise the Plaintiffs of the risk that Chase-NC and the individual plaintiffs would be found liable for some or all of GMAC's attorneys' fees. Defendants consistently downplayed the risk and very real possibility of such a ruling by the Court and failed to clearly explain that if Plaintiffs were ultimately unsuccessful on the issue, they could bear responsibility for GMAC's attorneys' fees in pursuing the issue.

2. None of the parties assert that the discovery provisions contained in N.C. Gen. Stat. § 1-15(c) are applicable to the facts of this case, and we do not discuss those provisions.

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

When the defendants' last act of negligence occurred is a factual issue to be determined by the trial court, sitting in the role of the jury. The above conclusion of law, and the underlying findings of fact show that the trial court found that defendants engaged in negligent conduct from 22 April 2005 through 15 March 2006. These findings are supported by evidence in the record, and are thus binding on this Court on appeal. *Lake*, 186 N.C. App. at 610, 652 S.E.2d at 673. Since plaintiffs' complaint was filed on 6 November 2007, this entire time period was within the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-15(c). The trial court correctly determined that a portion of plaintiffs' claims were not barred by the applicable statute of limitations.

This argument is without merit.

IV. Appeal of Plaintiffs

A. Statute of Limitations

[3] In their first argument, plaintiffs contend that the trial court erred in concluding that a portion of plaintiffs' claims were barred by the applicable statute of limitations. We disagree.

Our standard of review for this argument has been previously set forth in Section II.

This argument is directed towards defendants' representation of the individual plaintiffs, Jorgenson and Mellor. The trial court found as a fact and concluded that there were two separate and distinct periods of representation of Jorgenson and Mellor by defendants: the first running from October 2003 until the filing of the bankruptcy on behalf of Chase NC, and the second running from the dismissal of the bankruptcy petition until the dismissal of the state court action.

Plaintiffs set forth three arguments in support of their position that the trial court erred in applying the three-year statute of limitations to bar any claims arising out of the first period of representation.

1. Continuous Representation

Plaintiffs argue that defendants' representation of the individual plaintiffs was continuous, and that defendants' last act of negligence was within the three-year statute of limitations.

The evidence presented at trial was conflicting as to whether defendants represented Jorgenson and Mellor from October 2003 through April of 2004. Defendants asserted that they only represented

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

Chase NC during this time period. Jorgenson and Mellor asserted that defendants did represent them individually and gave them legal advice concerning their potential personal liability during this time period. The trial court found that when GMAC filed an amended complaint in the state court action adding Jorgenson and Mellor as individual defendants that Lefkowitz advised opposing counsel that he did not represent the individuals. A copy of this letter was sent to Jorgenson and Mellor. The trial court further found that: "Mr. Lefkowitz had clearly told them he could not represent them personally and also represent Chase NC in the bankruptcy" Following the dismissal of the bankruptcy in April of 2005, Lefkowitz filed answer in the state court action, on behalf of Jorgenson and Mellor, and advised them concerning whether GMAC could recover its attorneys' fees from them personally.

Each of these findings by the trial court is supported by evidence in the record and they are binding upon this Court. *Lake*, 186 N.C. App. at 610, 652 S.E.2d at 673. Whether there were two periods of legal representation of Jorgenson and Mellor or just one, was a factual determination to be made by the trial court. We hold that the trial court's findings of fact support its conclusion of law that any claims against defendants for legal malpractice during the period October 2003 through April of 2004 were barred by the three-year statute of limitations under N.C. Gen. Stat. § 1-15(c).

2. Halting of Statute of Limitations

Plaintiffs next contend that "Mr. Lefkowitz's renewed representation on the same matter as he previously advised, beginning on or about April 22, 2005, would have halted the running of the statute." Plaintiffs' cite no case authority for this creative proposition. We have found none, and find this argument to be without merit. N.C. R. App. P. 28(b)(6).

3. Duty to Non-Client Third-Parties

Finally, plaintiffs argue that even if Jorgenson and Mellor were not clients of defendants during the period of the bankruptcy, they were owed a duty by defendants under the rationale of *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). In *Miller*, this Court held that an attorney could be held liable for a defective title opinion that was furnished to and relied upon by a third-party non-client. The basis of this holding was that the express purpose of furnishing the title opinion

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

was to induce plaintiff to consummate a transaction with the client, and it was directly intended to affect plaintiff. *Id.* at 407, 263 S.E.2d at 318.

We first of all note that neither Jorgenson nor Mellor asserted a third-party beneficiary theory in their complaint, or at trial. “Failure to argue a theory of recovery below prohibits its assertion on appeal.” *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 131, 388 S.E.2d 538, 556 (1990) (citing *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972)).

Even assuming *arguendo* that this argument was preserved for appellate review, it has no merit. The trial court’s findings of fact make it abundantly clear that for the duration of the bankruptcy proceedings defendants did not represent Jorgenson or Mellor individually. This was documented in a number of communications by defendants, which were noted by the trial court. Where it was clear that defendants did not represent Jorgenson and Mellor individually, there can be no reasonable third-party reliance upon legal advice given solely to Chase NC. The trial court made no findings of fact that defendants provided any individual advice to Jorgenson or Mellor during the course of the bankruptcy.

B. Damages

[4] In their second argument, plaintiffs contend in the alternative that the trial court erred in the amount of damages awarded to Jorgenson and Mellor, specifically not including the additional \$62,202.84 over and above the amount ordered by the trial court that was paid by Jorgenson and Mellor as part of the \$300,000 settlement. We disagree.

On 17 January 2006, the trial court awarded GMAC \$237,797.16 in attorneys’ fees against Jorgenson and Mellor. The 27 February 2006 settlement was for a total of \$300,000, which included the amount awarded by the trial court, and an additional \$62,202.84 “to cover the expected balance of GMAC’s fees and costs.” Plaintiffs contend that the \$62,202.84 necessarily was for sums accrued after 30 September 2005, the last date for billings submitted to the trial court by GMAC in its motion. Since these damages accrued after 9 May 2005, plaintiffs argue that they should have been included in the award to Jorgenson and Mellor.

The trial court set out in detail how it computed the amount of attorneys’ fees awarded to Jorgenson and Mellor as follows:

CHASE DEV. GRP. v. FISHER, CLINARD & CORNWELL, PLLC

[211 N.C. App. 295 (2011)]

The Court came to this number by adding \$29,367.00 (the amount Mr. Mellor and Mr. Jorgenson personally paid to the law firm of Ellis & Winters, LLP, for fees and costs related to the services of attorney Andrew Chamberlain [sic] in concluding the state court case), \$14,790.30 (the amount Mr. Mellor and Mr. Jorgenson personally paid to Defendants for fees and costs incurred after May 9, 2005), and \$4,563.16 (the amount of GMAC's attorneys' fees to Katten Muchin Rosenman LLP which were incurred after May 9, 2005).

The trial court went on to hold that “[a]ny other damages claimed by Mr. Mellor and Mr. Jorgenson are either barred by the statute of limitations or were not proximately caused by the Defendants’ negligence.”

We have previously discussed that Jorgenson and Mellor’s claims for damages accruing prior to 15 April 2004 were barred by the three-year statute of limitations. In addition, the trial court held that throughout the dispute with GMAC, Jorgenson and Mellor consistently asserted that the line of credit was not obtained in violation of the recourse covenants. The trial court held that any negligent advice given by defendants to plaintiffs with respect to the personal liability of Jorgenson and Mellor resulting from the line of credit was “not the proximate cause of any damage to the Plaintiffs.”

The amount of pecuniary damages is not presumed. The burden of proving such damages is upon the party claiming them to establish by evidence, (1) such facts as will furnish a basis for their assessment according to some definite and legal rule, and (2) that they proximately resulted from the wrongful act.

Short v. Chapman, 261 N.C. 674, 681, 136 S.E.2d 40, 46 (1964).

In a non-jury trial, the court sits in the stead of the jury and makes the factual determinations as to damages that the jury would have made. One of these determinations was whether plaintiffs had shown that the damages claimed were proximately caused by the negligence of defendants.

In the instant case, the trial court found and concluded that with the exception of \$4,563.16, the costs and attorneys’ fees paid by Jorgenson and Mellor to GMAC were not proximately caused by the negligence of defendants. We note that the finding of fact supporting the amount of \$4,563.16 is not assigned as error by plaintiffs and is thus binding on this Court on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

This finding supports the amount of the trial court’s award to Jorgenson and Mellor contained in its conclusions of law.

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

This argument is without merit.

V. Conclusion

We hold that each of the challenged findings of fact of the trial court were supported by competent evidence in the record. These findings in turn, support the trial court's conclusions of law. The rulings of the trial court are affirmed.

AFFIRMED.

Judges STEPHENS and HUNTER, Jr., ROBERT N. concur.

STATE OF NORTH CAROLINA v. PHILLIP ANTOINE WOMACK

No. COA10 1184

(Filed 19 April 2011)

**1. Constitutional Law— effective assistance of counsel—
counsel's admission to prior convictions—no reasonable
likelihood of different outcome**

Defendant did not receive ineffective assistance of counsel at a hearing to determine if he had attained habitual felon status. Defense counsel's admission that defendant had three prior felony convictions did not violate *State v. Harbison*, 315 N.C. 175, and the *Harbison* rule does not apply to sentencing proceedings. Furthermore, even assuming *arguendo* that defense counsel's representation was deficient, there was no reasonable likelihood that the outcome at defendant's habitual felon proceeding would have been different had his trial counsel not made the challenged comment.

**2. Constitutional Law— effective assistance of counsel—
counsel's statement—no reasonable likelihood of different
outcome**

Defendant did not receive ineffective assistance of counsel at a sentencing hearing for his conviction of possession of drugs. Defense counsel's challenged statement was nothing more than a slip of the tongue and the isolated statement, taken in context, did not constitute deficient performance.

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

Appeal by defendant from judgment entered 2 March 2010 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2011.

Attorney General Roy Cooper, Special Deputy Attorney General Lars F. Nance, for the State.

Leslie C. Rawls, for defendant-appellant.

ERVIN, Judge.

Defendant Phillip Antoine Womack appeals from a judgment sentencing him to a minimum term of 107 months and a maximum term of 138 months imprisonment in the custody of the North Carolina Department of Correction based on jury verdicts convicting him of possession of methylenedioxymethamphetamine and having attained the status of an habitual felon. On appeal, Defendant contends that he received ineffective assistance of counsel at the proceeding held for the purpose of determining whether he had attained habitual felon status and during the sentencing hearing based on comments made by his trial counsel. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that no error occurred during the proceedings leading to the entry of the trial court's judgment.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Officer Adam Deal has been an officer with the Greensboro Police Department since 2004. Officer Deal initially encountered Defendant while on routine patrol during the pre-dawn hours on 11 May 2008, at which time he was responding to an anonymous report that shots had been fired at an apartment complex. Upon arriving at the complex, Officer Deal observed Defendant, who was irate and yelling, outside of Apartment K. After identifying himself, Officer Deal performed a pat down of Defendant and obtained Defendant's identification card. Officer Deal did not find any weapons on Defendant.

Defendant told Officer Deal that he had heard shots fired near the parking lot and was afraid that someone was shooting at him. In addition, Defendant warned Officer Deal to "watch out" for the person who drove a gray or silver Pontiac that was parked next to Apartment

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

K. At the conclusion of this conversation, Officer Deal had no reason to suspect Defendant and told him that he was free to leave.

After ending his conversation with Defendant, Officer Deal began to search the area for evidence. While examining the parking lot, Officer Deal located the gray Pontiac that Defendant had mentioned and noticed that the vehicle had apparently sustained gunshot damage. In addition, Officer Deal located a number of empty shotgun shells about fifteen feet from the Pontiac in the direction of Apartment K.

At that point, Officer Deal spoke with the occupants of Apartment K, who identified Defendant as the person who had fired the shots that precipitated the call that led to Officer Deal's presence in the vicinity and damaged the gray Pontiac. Based on this information and the discoveries that he had made while examining the surrounding area, Officer Deal began searching for Defendant.

As he was attempting to locate Defendant, Office Deal saw Defendant coming out of an apartment. Officer Deal stopped Defendant for a second time, handcuffed him, and frisked him again because Defendant had been out of his sight and had had the opportunity to acquire a weapon during the interval between the first and second pat down searches. In the course of this second frisk, Officer Deal felt a "ball of sponge-like material [that was] approximately the size of a golf ball." Based on his expertise and experience, Officer Deal believed the item in Defendant's possession to be contraband, such as a bag of marijuana.

Officer Deal removed the item from Defendant's pocket and discovered that it was a wad of tissue paper that contained several hard items. At that point, Officer Deal suspected that the tissue contained crack cocaine, opened it, and found three small yellow pills which he believed to be ecstasy. A field test performed on the pills confirmed Officer Deal's impression. Special Agent Carroll Bazemore, a forensic drug chemist employed by the State Bureau of Investigation, tested the pills seized from Defendant and determined that they contained .4 grams of methylenedioxymethamphetamine, a substance commonly referred to as ecstasy.

2. Defendant's Evidence

Although Defendant's testimony at trial was generally consistent with that of Officer Deal, Defendant stated that Officer Deal removed several items from his pocket at the time of the initial pat down, including his identification card. In addition, Defendant claimed that Officer Deal grabbed and handcuffed him during their second

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

encounter. Subsequently, Officer Deal had Defendant turn and face him, at which point Officer Deal showed Defendant the tissue and pills that he claimed to have seized from Defendant's back pocket. At that point, Defendant testified that Officer Deal told him he was under arrest and placed him in a patrol car.

B. Procedural History

On 7 July 2008, the Guilford County grand jury returned bills of indictment charging Defendant with possession of methylenedioxymethamphetamine and having attained the status of an habitual felon. The cases against Defendant came on for trial before a jury at the 2 March 2010 session of the Guilford County Superior Court. On the same date, the jury returned verdicts convicting Defendant of possession of methylenedioxymethamphetamine and having attained the status of an habitual felon. At the ensuing sentencing hearing, the trial court found that Defendant had accumulated nine prior record points and should be sentenced as a Level IV offender. Based upon these determinations, the trial court sentenced Defendant to a minimum term of 107 months and a maximum term of 138 months imprisonment in the custody of the North Carolina Department of Correction. On 24 August 2010, this Court granted Defendant's petition seeking the issuance of a writ of *certiorari* for the purpose of reviewing Defendant's challenges to the trial court's judgment.

II. Legal AnalysisA. Standard of Review

In both of the two arguments that he advances on appeal, Defendant claims that he received constitutionally deficient representation from his trial counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. In analyzing ineffective assistance of counsel claims, we utilize a two-part test, under which the "[d]efendant must show (1) that 'counsel's performance was deficient,' meaning it 'fell below an objective standard of reasonableness,' and (2) that 'the deficient performance prejudiced the defense,' meaning that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *State v. Mohamed*, — N.C. App. —, —, 696 S.E.2d 724, 733 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)). Our law recognizes a "strong presumption that counsel's conduct falls within the wide range of reasonable profes-

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

sional assistance[.]” *Strickland*, 466 U.S. at 689, 80 L. E. 2d at 694, 104 S. Ct. at 2065. A defendant may rebut the presumption that his or her counsel provided adequate representation by showing the acts or omissions upon which his or her claim is predicated did not “result [from the exercise of] reasonable professional judgment,” so that, “in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690, 80 L. E. 2d at 695, 104 S. Ct. at 2066. In proving whether counsel’s actions resulted in prejudice to the defendant, he or she must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different[.]” with a “reasonable probability” being “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 80 L. E. 2d at 698, 104 S. Ct. at 2068. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland*, 466 U.S. at 697, 80 L. Ed 2d at 699, 104 S. Ct. at 2069.

As a general proposition, ineffective assistance of counsel “claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002). However, “ ‘should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *Mohamed*, — N.C. App. at —, 696 S.E.2d at 733 (quoting *Fair*, 354 N.C. at 167, 557 S.E.2d at 525).

B. Admission of Convictions

[1] First, Defendant contends that he received ineffective assistance because his trial counsel conceded Defendant’s guilt of three prior felonies during the habitual felon proceeding. Although we agree that this component of Defendant’s ineffective assistance claim can be appropriately resolved on direct appeal, we do not believe that Defendant is entitled to appellate relief on the basis of this claim.

The habitual felon indictment returned against Defendant in this case alleged that:

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

. . . [O]n or about the date of offense [11 May 2008] and in the county named above [Guilford] the defendant named above [Phillip Antoine Womack] unlawfully, willfully, and feloniously did commit one or more felonious offenses while being an habitual felon. This offense was committed after defendant was convicted of at least three (3) successive felony offenses subsequent to July 6, 1967, the effective date of this statute, to wit:

1. That on or about October 19, 1998, in the Superior Court of Guilford County, North Carolina, the defendant pled guilty to and/or was convicted of the felony offense of Robbery with a Dangerous Weapon against the State of North Carolina, with the commission date of July 8, 1998 (98 CRS 23596);
2. That thereafter on or about February 2, 2005, in the Superior Court of Guilford County, North Carolina, defendant pled guilty to and/or was convicted of the felony offense of Larceny of [a] Motor Vehicle against the State of North Carolina, with the commission date of April 15, 2004 (04 CRS 76900);
3. That thereafter on or about August 31, 2006 in the Superior Court of Guilford County, North Carolina, defendant pled guilty to and/or was convicted of the felony offense of Possession of [a] Stolen Motor Vehicle against the State of North Carolina, with the commission date of August 2, 2005 (05 CRS 86842).

At least two (2) of the aforementioned felony convictions against the peace and dignity of the State were committed after the defendant had attained the age of 18 years.

On direct examination at the guilt-innocence phase of the trial, Defendant testified that:

Q. Now, you've been convicted of prior offenses?

A. Yes.

Q. What offenses have you been convicted of?

A. Like, everything?

Q. Well, in terms of what you've been convicted of.

A. I got a few marijuana charges, um, possession of a stolen motor vehicle, larceny of a motor vehicle, um, probation violation.

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

Q. But that was as a result of these other convictions?

A. Yes. That was, like, catching those charges while I was on probation.

On cross-examination, Defendant testified that:

Q. Do you recall being convicted of Flee to Elude in August of '06?

A. They charged—that charge was dismissed. I wasn't convicted of it. I—it had something to do with the plea bargain. The plea bargain was possession of a stolen motor vehicle and they would drop fleeing to elude, speeding, and I think I ran a stop sign.

Q. Are you Phillip Womack?

A. Yes.

Q. Date of birth September 19, 1982?

A. Yes.

Q. Do you recall being convicted of 05 CRS 86843 on August 31st of 2006 of felony flee to elude arrest?

A. If it was part of a plea bargain—with a plea bargain, they just said they're going to drop certain charges if you take a plea, and they'll let you go.

Q. But that was the same date you were convicted of possession of a stolen motor vehicle—

A. Yes.

While the jury was deliberating the issue of Defendant's guilt, the following colloquy occurred between the trial court and Defendant's trial counsel:

THE COURT: [Defense Counsel], I have a question. Now, your client still wants to have a trial on whether he's an habitual felon or not?

[DEF. COUN.]: Well, I talked to him about that. We'll stipulate to the habitual felon charge—

THE COURT: He'd have to plead guilty to it or either you have a trial. There's no in-between. Either plead guilty to it, "yes," and you fill out a transcript of plea to that effect, or either we have a trial on it.

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

[DEF. COUN.]: And, Judge, the main concern I have is whatever this bill that they have in the legislature, whether it would have an effect on him if he pled guilty as opposed to—having a trial. I mean—

THE COURT: What is the bill?

[DEF. COUN.]: Oh, there's one that says that the H and I's may be removed as—as underlying crimes for the habitual—

THE COURT: That's only to be applied retroactively [sic].

[DEF. COUN.]: That is correct. There's a lot of "ifs" involved.

THE COURT: And if they applied it retroactively, it would apply to him whether he admits to it or not.

(Counsel and defendant confer off the record)

[DEF. COUN.]: I guess we'll have a trial, Judge.

At the habitual felon sentencing hearing, the State introduced certified copies of documents establishing Defendant's convictions for larceny of a motor vehicle, robbery with a dangerous weapon, and possession of a stolen motor vehicle and argued the State's case to the jury. At the habitual felon hearing, Defendant's trial counsel argued that:

Basically, just to give—flesh out some of these charges, all of them my client pled guilty to. The armed robbery or the robbery with a dangerous weapon, my client was 15 years of age. Note his date of birth and check that out. So this is a totally youthful indiscretion.

As far as the stolen vehicle, my client indicated although he pled guilty, this was a situation where he was in the State of South Carolina; that he was not aware of the vehicle being stolen. Apparently, it was involved in an accident down there and was impounded, and then as it turned out, he entered into a guilty plea. Generally, these are the result of whatever plea agreements are worked out with the prosecutor, and so I want you to consider that in making your determinations.

In his brief, Defendant argues that his trial counsel's concluding argument at the habitual felon proceeding contravened the principle enunciated in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672, 106 S. Ct. 1992 (1986), in which the Supreme Court held that "a counsel's admission of his

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance[.]" *Id.* at 179, 337 S.E.2d at 506-07. We do not find Defendant's argument persuasive.

The first problem with Defendant's challenge to his trial counsel's comments is that no *Harbison* violation occurred. In order to reach this conclusion, we must examine the determinations that must be made in order for a convicted criminal defendant to be sentenced as an habitual felon.

An habitual felon is "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof[.]" N.C. Gen. Stat. § 14-7.1.

For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed . . . For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony.

Id. As a result, the mere fact that a defendant has been convicted of three felony offenses does not, without more, suffice to support a finding that he or she is an habitual felon for purposes of N.C. Gen. Stat. § 14-7.1.

"Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). For that reason, the mere fact that a person has attained habitual felon status, "standing alone, will not support a criminal sentence." *Id.* Instead, "[w]hen an habitual felon . . . commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty . . . be sentenced as a Class C felon." N.C. Gen. Stat. § 14-7.6. The only effect of establishing that a defendant has attained habitual felon status "is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status." *Allen*, 292 N.C. at 435, 233 S.E.2d at 588.

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

Although Defendant's trial counsel admitted that his client had pled guilty to three felonies and discussed circumstances that served to mitigate the significance of Defendant's robbery and possession of a stolen vehicle convictions, he never argued that the jury should find that Defendant had attained habitual felon status. In fact, the jury could not have properly returned a verdict finding that Defendant had attained habitual felon status on the basis of the information contained in the challenged argument, since Defendant's trial counsel did not concede that Defendant met either the age or chronology criteria set out in N.C. Gen. Stat. § 14-7.1. The Supreme Court has clearly held that no *Harbison* violation occurred when "counsel stated there was malice, [but] did not admit guilt[.]" *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986). Similarly, in this case, Defendant's trial counsel admitted that Defendant had three prior felony convictions, but he never admitted that Defendant had attained habitual felon status and, in fact, suggested that the jury take certain mitigating factors into consideration in its deliberations. Thus, we conclude that the argument made by Defendant's trial counsel did not run afoul of the principle enunciated in *Harbison*.

Moreover, the Supreme Court has explicitly held that "[t]he *Harbison* rule [] does not apply to sentencing proceedings." *State v. Fletcher*, 354 N.C. 455, 481-82, 555 S.E.2d 534, 550 (2001) (citing *State v. Boyd*, 343 N.C. 699, 723, 473 S.E.2d 327, 340 (1996), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722, 117 S. Ct. 778 (1997)) and *State v. Walls*, 342 N.C. 1, 57, 463 S.E.2d 738, 768 (1995) (stating that "*Harbison* applies only to the guilt/innocence phase of a trial"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794, 116 S. Ct. 1694 (1996))), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73, 123 S. Ct. 184 (2002). As a result of the fact that the alleged *Harbison* error occurred at a proceeding convened for the purpose of determining whether Defendant's sentence should be enhanced because of his prior criminal

Defendant's claim for this reason as well. Thus, Defendant's challenge to his trial counsel's argument is most appropriately examined using the approach outlined in *Strickland* rather than the approach outlined in *Harbison*. *Fletcher*, 354 N.C. at 482, 555 S.E.2d at 550.

A careful examination of the record indicates that the State's evidence to the effect that Defendant had attained habitual felon status was overwhelming. At the habitual felon proceeding, the State introduced certified documentary evidence that Defendant had committed the offenses alleged in the habitual felon indictment. Assuming

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

that Defendant had committed and been convicted of those offenses on the dates in question, he had clearly attained habitual felon status. Defendant has not contended that he had any basis for contesting the State's contention that he committed and was convicted of each of those prior felonies on the dates specified in the habitual felon indictment. On the contrary, Defendant admitted having been convicted of possession of a stolen motor vehicle and larceny of a motor vehicle during his testimony at the guilt-innocence phase of the trial. At one point, Defendant appeared ready to stipulate that he had attained habitual felon status, but he ultimately elected not to do so. Assuming, without in any way deciding, that Defendant's trial counsel provided him with deficient representation by making the challenged comments, we readily conclude that there is no reasonable likelihood that the outcome at Defendant's habitual felon proceeding would have been different had his trial counsel not made the challenged comments, leading inexorably to the conclusion that Defendant's ineffective assistance of counsel argument based upon those comments has no merit.

C. "Take Umbrage with my Client"

[2] Secondly, Defendant claims he also received deficient representation at his sentencing hearing based on a comment made by his trial counsel "ask[ing] the Court to take umbrage with my client in terms of sentencing him in the mitigating range, which I believe would be an 80-month minimum sentence." Although we agree that no additional factual development needs to occur prior to consideration of this claim so that it is cognizable on direct appeal, we do not find Defendant's argument persuasive.

As Defendant correctly points out in his brief, the dictionary defines umbrage as "a reason for doubt . . . a feeling of resentment[.]" *Webster's Ninth New Collegiate Dictionary* 1280 (1991). Based upon this fact, Defendant argues that his trial counsel actually urged the trial court to impose a harsh sentence on him. However, we believe that this comment, taken in context, cannot be construed as a request that the trial court sentence Defendant harshly.

At the sentencing hearing, Defendant's trial counsel argued that:

I have to concur with the assistant DA that this is a Level 4 for sentencing purposes. You've heard the evidence that's been submitted at trial, Your Honor. This was—although certainly within the meaning of the statute, this was a low-level conviction in terms of the quantity and those types of elements. I

STATE v. WOMACK

[211 N.C. App. 309 (2011)]

would ask the Court to take umbrage with my client in terms of sentencing him in the mitigating range, which I believe would be an 80-month minimum sentence.

I realize he had the outburst before and he did apologize to Your Honor, and certainly, Mr. Womack is entitled to his adjudicated day in court, his due process. Certainly, he couldn't have asked for a fairer trial. So I would just ask the Court to consider that, given the circumstances of this particular offense.

A careful analysis of the statements made by Defendant's counsel indicates that these comments included an assertion that Defendant's offense was "low-level" in nature and requests that Defendant be sentenced in the mitigated range and be treated leniently. When taken in context, it is clear that Defendant's trial counsel used the word "umbrage" in the sense of "mercy" rather than in accordance with its literal meaning. As a result, we conclude that the reference by Defendant's trial counsel to "taking umbrage" with Defendant represents nothing more than a slip of the tongue and that, while Defendant's trial counsel could have chosen his words more carefully, we are unable to conclude that this isolated statement, taken in context, constitutes deficient performance, entitling Defendant to a new sentencing hearing.

III. Conclusion

For the reasons set forth above, we conclude that Defendant has failed to show that he is entitled to relief on appeal as the result of deficient performance by his trial counsel. Thus, the trial court's judgment should remain undisturbed.

NO ERROR.

Judges ROBERT C. HUNTER and STEPHENS concur.

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

STATE OF NORTH CAROLINA v. DEON JERRILL McLEAN

No. COA10-601

(Filed 19 April 2011)

1. Assault— deadly weapon inflicting serious injury—sufficient evidence

The trial court erred as a matter of law in denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. There was sufficient evidence of all elements of the crime including that the victim sustained a serious injury.

2. Assault— deadly weapon inflicting serious injury—jury instruction—definition of serious injury—no error

The trial court did not err as a matter of law in an assault with a deadly weapon with intent to kill inflicting serious injury case by failing to define "serious injury" in its jury instructions. Our courts have chosen not to narrowly define "serious injury" in the context of assaults, and the trial court was not required to define the term as requested by defendant.

3. Firearms and Other Weapons— discharging weapon into moving vehicle—jury instruction

The trial court's jury instructions in a discharging a weapon into a moving vehicle case were not erroneous. The instructions correctly stated the requisite mental intent and did not reduce the State's burden of proof to prove intent beyond a reasonable doubt.

4. Appeal and Error— sentencing—no appeal as of right

Defendant's argument that he was entitled to a new sentencing hearing was not addressed. Defendant was not entitled to appeal the sentencing issue as a matter of right because he would have been a prior record level II with or without the challenged sentencing point and he was sentenced in the presumptive range.

Appeal by Defendant from judgments entered 22 January 2010 by Judge Walter H. Godwin, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 2 November 2010.

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

Attorney General Roy Cooper, by Assistant Attorney General Kimberley A. D'Arruda, for the State.

Sue Genrich Berry, for Defendant.

BEASLEY, Judge.

Deon Jerrill McLean (Defendant) appeals from judgments entered on his convictions of one count of assault with a deadly weapon with the intent to kill inflicting serious injury, one count of assault with a deadly weapon, and one count of discharging a firearm into a moving vehicle. For the following reasons, we hold that the trial court committed no error.

On 7 July 2008, a Wayne County Grand Jury returned a six-count indictment charging Defendant with two counts of assault with a deadly weapon with intent to kill inflicting serious injury, three counts of discharging a firearm into a conveyance in motion, and one count of first degree murder. Prior to trial, the State dismissed two of the three counts of discharging a firearm into a moving vehicle. Trial on the remaining charges commenced at the 19 January 2010 Criminal Session of Wayne County Superior Court.

On 5 June 2007 Officer James Serlick with the Goldsboro Police Department received several calls in connection with this matter. He first responded to a trespassing call at Darnell's Convenient Mart and then was dispatched to a residence on Crawford Street based on a report that two people there had been shot. Upon arrival, Serlick found Jaquan Hines and Shawntana Thompson sitting on the front porch; one had been shot in the calf and the other had been shot in the foot. Both men were bleeding and were taken to the hospital. Serlick later received a call to go to the McLean's residence on East Elm Street, where he learned from one of Defendant's brothers about "some problems" between the McLean and Hines families. While there, Serlick heard loud gunshots that sounded like they came from a shotgun and from very nearby. Serlick then arrived at the scene to find Antron Hines had been shot. Antron died as a result of two shotgun wounds—one to his back and one to his left leg.

Jaquan Hines testified that on 5 June 2007, he and his brother Antron were living in Fayetteville but had ridden with Antron's girlfriend to Goldsboro. After arriving at their sister's house, Jaquan went to Darnell's, where he met his friends Antoine Pope and Shawntana Thompson. Outside the store, Jaquan "had some words" with Everette

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

McLean, another brother of Defendant, “about the family situation,” wherein each expressed his intention to side with his own brother. Jaquan and Defendant began to fight inside the store, and after the altercation was broken up, they continued fighting outside, and additional people associated with each man joined in the affray. Jaquan saw someone give Defendant a shotgun, and Jaquan and Shawntana left running when Defendant began shooting. Jaquan was shot in the leg, and it took six months for the “[e]ighteen to 20-something” pellets to work themselves out of his body. Shawntana was shot when he ran behind a van in the store’s parking lot. He then ran down the street alongside a school bus as he heard the shotgun being fired “a lot more times.” Shawntana continued running onto Crawford Street, where he saw Jaquan on a porch, and an ambulance later took both men to the hospital.

Samuel McClary, a bus driver for Wayne County Public Schools, had been taking students home on 5 June 2007 and was stopped at a red light when he observed “a commotion at Darnell’s” and saw Defendant with a shotgun. McClary instructed the children to get down on the floor before putting the bus in park and then getting on the floor of the bus as well. After hearing gunfire, the bus driver saw “a couple of boys that came [running] by the bus” and then looked up to see that “[D]efendant was standing there with a shotgun in his hand.” Upon later inspection, McClary and a police officer discovered that seven or eight projectiles had struck the bus just below the windshield on the driver’s side.

On 22 January 2010, the jury found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury to Jaquan Hines; guilty of the lesser included offense of assault with a deadly weapon as to Shawntana Thompson; and guilty of discharging a firearm into a moving vehicle. The trial court declared a mistrial as to the murder charge, due to the jury’s inability to reach a unanimous verdict. The trial court sentenced Defendant as a prior record level II and imposed consecutive terms of 100-129 months’ imprisonment for the conviction of assault with a deadly weapon with intent to kill inflicting serious injury, 75 days for the conviction of assault with a deadly weapon, and 77-102 months for the conviction of discharging a firearm into a moving vehicle. Defendant timely filed his notice of appeal.

I.

[1] Defendant argues that the trial court erred as a matter of law in denying his motion to dismiss the charge of assault with a deadly

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

weapon with intent to kill inflicting serious injury to Jaquan Hines on the grounds of insufficient evidence.

In reviewing a motion to dismiss which challenges the sufficiency of the evidence, “the question for this Court is whether there is substantial evidence of each essential element of the offense charged.” *State v. Borkar*, 173 N.C. App. 162, 165, 617 S.E.2d 341, 343 (2005). “If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). It is the trial court’s duty, when ruling on a motion to dismiss, to

consider all the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom, and it must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury.

State v. Pigott, 331 N.C. 199, 207, 415 S.E.2d 555, 559-60 (1992) (internal quotation marks and citations omitted). “Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.” *State v. Parker*, 185 N.C. App. 437, 440-41, 651 S.E.2d 377, 380 (2007) (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)). “The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both[,]” and if such evidence supports “a reasonable inference of defendant’s guilt,” the motion to dismiss should be denied. *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citations omitted). As a question of law, we review de novo the denial of a criminal defendant’s motion to dismiss for insufficient evidence. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are: “(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.” *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). Defendant contends that there was insufficient evidence that Jaquan Hines sustained a serious injury to support the conviction. We disagree.

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

Our Supreme Court “has not defined ‘serious injury’ for purposes of assault prosecutions, other than stating that ‘[t]he injury must be serious but it must fall short of causing death’ and that ‘[f]urther definition seems neither wise nor desirable.’” *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). However, several relevant factors that may guide the determination of whether serious injury has been inflicted, including, but not limited to: “(1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work.” *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 809 (2004) (citing *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991)). Notably, this Court has indicated that competent evidence on any one of these factors is sufficient in itself to constitute substantial evidence of serious injury. See *Bagley*, 183 N.C. App. at 526, 644 S.E.2d at 623 (“Substantial evidence of a serious injury that is sufficient to survive a motion to dismiss includes, but is not limited to, evidence of ‘hospitalization, pain, blood loss, and time lost at work.’”); see also, e.g., *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978) (“Evidence that the victim was hospitalized is not necessary for the proof of serious injury.”).

Still, “[w]hether a serious injury has been inflicted is a factual determination within the province of the jury,” *Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 809, as the decision must be made on a case-by-case basis “according to the particular facts” and circumstances involved, *Jones*, 258 N.C. at 91, 128 S.E.2d at 3; see also *Ramseur*, 338 N.C. at 507, 450 S.E.2d at 471 (“Whether ‘serious injury’ has been inflicted must be decided on the facts of each case.”). In fact, our Supreme Court has observed that

[c]ases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious. See *Joyner*, 295 N.C. at 65, 243 S.E.2d at 374 (“there being evidence of physical or bodily injury to the victim, the question of the nature of these injuries was . . . properly submitted to the jury”).

State v. Alexander, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994). Defendant concedes that whether a serious injury occurred is generally a factual determination, but only where there is some evidence to support it, which he argues is lacking in this case. He emphasizes Jaquan’s

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

“unequivocal” testimony that he did not “have [any] pain and suffering as a result of [the gunshot wounds to his leg].” Defendant also contends that Shawntana’s testimony that Jaquan was bleeding “does not arise [*sic*] to the level of loss of blood.” Defendant further argues that there is no evidence that Jaquan actually received care or treatment at the hospital after being transported there by ambulance or that he lost time from work or any other activities.

Defendant’s focus on these four factors, however, largely ignores our courts’ specific instruction that this list of circumstances pertinent for jury consideration is not an exhaustive one. Even assuming *arguendo* that transportation of a shooting victim to the hospital by ambulance is not sufficient to show “hospitalization,” there was substantial “evidence of physical or bodily injury to the victim,” Jaquan. Testimony at trial showed that Defendant shot Jaquan with a shotgun, resulting in injuries to the front of Jaquan’s calf, and that the victim had eighteen to twenty pellets in his leg, which did not fully “work themselves out” of Jaquan’s body for six months. Shawntana testified that it looked like Jaquan had holes in his leg “from the ankle on up,” and Serlick observed blood on Jaquan’s leg and noted that his gunshot wounds looked like “little holes from birdshot from a shotgun.” We hold this constituted substantial evidence not only that Jaquan sustained bodily injury but also that his gunshot wounds were serious; thus, the question of the nature of these injuries was properly submitted to the jury.

[2] Defendant also argues that the trial court erred as a matter of law in failing to define “serious injury” in its jury instructions, as requested by Defendant and agreed to during the charge conference. We disagree.

Although the trial judge may have agreed to give the North Carolina Pattern Jury Instruction 120.12, defining “serious injury” as an injury that “causes great pain and suffering,” N.C.P.I. Crim. 120.12 (1998), the omission thereof during his charge to the jury was not error. The trial court’s instruction to the jury on the charge of assault with a deadly weapon with intent to kill inflicting serious injury tracked the North Carolina Pattern Jury Instruction on that offense. See N.C.P.I. Crim. 208.15 (2008). While this pattern instruction includes a footnote that suggests a trial court *may* define serious injury as one that causes great pain and suffering, *see id.* at n.4, our courts have also chosen not to narrowly define “serious injury” in the context of assaults, as explained above. Likewise, the trial court was

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

not required to define the term as requested by Defendant and, accordingly, committed no error in omitting to do so.

II.

[3] Defendant argues that the trial court erred as a matter of law in its instructions to the jury on the count of discharging a weapon into a moving vehicle. We disagree.

Defendant was charged with discharging a firearm into a conveyance in motion in violation of N.C. Gen. Stat. § 14-34.1(b), which makes it a Class D felony for any person to “willfully or wantonly discharge[] a weapon . . . into any occupied vehicle . . . or other conveyance that is in operation.” N.C. Gen. Stat. § 14-34.1(b) (2009); *see also State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995) (noting that the elements of the more general offense of discharging a firearm into occupied property are “(1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied”). As interpreted by our Supreme Court,

a person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied [vehicle] with knowledge that the [vehicle] is then occupied by one or more persons or when he has reasonable grounds to believe that the [vehicle] might be occupied by one or more persons.

State v. James, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996) (citation omitted). Moreover, “[d]ischarging a firearm into a vehicle does not require that the State prove any specific intent [to shoot into the vehicle] but only that the defendant perform the act which is forbidden by statute. It is a general intent crime.” *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994). This Court has further explained:

There is no requirement that the defendant have a specific intent to fire into the occupied building, only that he . . . (1) intentionally discharged the firearm at the occupied building with the bullet(s) entering the occupied building, or (2) intentionally discharged the firearm at a person with the bullet(s) entering an occupied building.

State v. Byrd, 132 N.C. App. 220, 222, 510 S.E.2d 410, 412 (1999) (internal citations omitted).

Defendant argues that the trial court’s instructions on this charge incorrectly stated the requisite mental intent, thereby reducing the

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

State's burden of proof. Specifically, Defendant challenges the portion of the charge instructing the jury that in order to convict him of "discharging a firearm into an occupied vehicle, to wit, a school bus," it must first find "that the defendant willfully or wantonly, that is intentionally, with knowledge or reasonable grounds to believe the act would endanger the life or safety of the others, discharg[ed] the firearm into the school bus." Defendant also argues that the portion of the mandate stating that to support a guilty verdict, Defendant must have, in part, "willfully and wantonly discharged a firearm into a school bus," constituted an inaccurate statement on intent. He contends that the trial court varied from the pattern jury instruction in equating "willful or wanton" with "intentional" during the substantive charge and omitting "intentionally" altogether from the mandate. Defendant alleges that his constitutional due process rights were thus violated because the trial court's instructions allowed the jury to convict him "on willful or wanton conduct, and thereby reduced the State's burden of proof to prove intentionally beyond a reasonable doubt." See *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, — (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

We first note that, while the use of pattern jury instructions is encouraged, it is not required, and "[f]ailure to follow the pattern instructions does not automatically result in error" because we do not require adherence to " 'any particular form,' as long as the [trial court's] instruction adequately explains each essential element of an offense." *State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 870 (2010) (citations omitted).

Second, it is Defendant, not the trial court, who misquotes the pattern instructions the trial court agreed to give or, perhaps, overlooks the most recent version thereof. Defendant argues in his brief that the appropriate pattern jury instruction describes the relevant mental state as "willfully or wantonly *and* intentionally." However, the trial court proposed giving pattern jury instruction 208.90D, entitled "Discharging a Firearm Into Occupied Vehicle in Operation" and referencing N.C. Gen. Stat. § 14-34.1(b). The transcript reflects not only that the trial court did indeed give the instruction proposed at the charge conference but also that the portion of the instruction as given which Defendant now seeks to challenge was an exact recitation of the language appearing in N.C.P.I. Crim. 208.90D. The instruction provides that among the four things the State must prove beyond a reasonable doubt,

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

First, that the defendant willfully or wantonly, *that is intentionally* with knowledge or a reasonable ground to believe that the act would endanger the rights or safety o[f] others, discharged a firearm into a [vehicle] [aircraft] [watercraft] [other conveyance (*describe conveyance*)]

N.C.P.I. Crim. 208.90D (2009) (emphasis added). While the record does not contain copies of which instructions were actually submitted during the charge conference, and the pattern jury instruction at issue is dated June 2009-suggesting that Defendant may be relying on an earlier version-trial in this matter commenced in early 2010, and it is clear that the trial court instructed the jury in accordance with the pattern instruction in effect at that time. Thus, Defendant's contention, focused on an alleged variance from the pattern jury instruction by the trial court, is mistaken.

In addition to the trial court's adherence to N.C.P.I. 208.90D, the challenged instructions constitute an entirely correct recitation of the law. Thus, the trial court did not omit any element required by N.C. Gen. Stat. § 14-34.1(b) or any fact necessary to constitute the crime proscribed thereunder, as Defendant claims. In construing the mental state required by § 14-34.1, our Supreme Court clarified that "the words 'wilful' and 'wanton' refer to elements of a single crime," where:

[w]ilful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law. Wantonness . . . connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

State v. Williams, 284 N.C. 67, 72-73, 199 S.E.2d 409, 412 (1973) (internal quotation marks and citations omitted). The Court noted that the elements of a willful act and a wanton one under § 14-34.1 "are substantially the same" such that any "attempt to draw a sharp line between [them]" would be an exercise in futility. *Id.* at 73, 199 S.E.2d at 412. Interpreting the statute in accordance with this observation, the Court held that § 14-34.1 criminalizes "intentionally, without legal justification or excuse, discharg[ing] a firearm into an occupied [vehicle] with knowledge that the [vehicle] is then occupied by one or more persons or when he has reasonable grounds to believe that the [vehicle] might be occupied by one or more persons." *Id.* (emphasis omitted). Thus, the phrase, "that is intentionally, with knowledge or reasonable grounds to believe the act would endanger

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

the life or safety of the others,” which the trial court appended to the requirement of “willfully and wantonly” in its instructions mirrors the definition of “wilful and wanton” provided in *Williams*. Accordingly, an intentional action (e.g., *intentionally* discharging a firearm rather than pulling the trigger by mistake) performed with the knowledge or reasonable grounds to believe the act would endanger the life or safety of others is indeed willful and wanton conduct.

Defendant himself notes in his brief that “[j]urors depend on the trial judge to accurately instruct them as to legal meanings” of terms such as “willfully and wantonly” and “intentionally.” This the trial court did in its instructions, which were entirely consistent with the pattern jury instruction, completely accurate, and left out no fact necessary to constitute the crime of discharging a firearm into a moving vehicle. In any event, Defendant misapprehends the law in his argument that the trial court’s instructions relieved the State from having to prove the “intentionally” element separately. He contends that even though he might have “acted willfully when he fired the shotgun and he may have acted wantonly when he fired the shotgun in that situation, . . . he did not intentionally shoot the school bus.” As stated above, however, § 14-34.1 does not require that a defendant specifically intend to shoot into the vehicle because that result need only be the product of a general intent—one satisfied by Defendant’s admittedly intentional firing of the shotgun under such circumstances where he had reason to believe the school bus that he ended up shooting seven to eight times was occupied. Accordingly, where there is no evidence that Defendant pulled the trigger multiple times by mistake and he acknowledges that the evidence reasonably shows he “acted willfully when he fired,” he could show no prejudice even if the trial court’s instruction were erroneous. Thus, we overrule this argument.

III.

[4] Defendant argues that he is entitled to a new sentencing hearing because the trial court erred in assigning a criminal history point based on the unsupported finding that Defendant was on probation at the time he committed these offenses. However, because Defendant would have had a Prior Record Level of II with or without the one point added for committing the offenses while on probation and he was sentenced in the presumptive range, he is not entitled to appeal this sentencing issue as a matter of right:

A defendant who has been found guilty . . . is entitled to appeal as a matter of right the issue of whether his or her sentence is sup-

STATE v. McLEAN

[211 N.C. App. 321 (2011)]

ported by evidence introduced at the trial and sentencing hearing *only if* the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2009) (emphasis added).

Defendant was assigned one record point for a prior class A1 or 1 misdemeanor conviction and one point for committing the offenses while on supervised or unsupervised probation, for a total of two points. Two points corresponds with a prior record level of II, but even if the one point for having committed the offenses while on probation were removed, leaving one prior record point, Defendant would still have had a prior record level of II pursuant to the statute in effect at the time of the offenses in 2007. *See* N.C. Gen. Stat. § 15A-1340.14(c)(2) (2007).¹ Moreover, Defendant does not argue that he was sentenced according to the wrong record level. Thus, he cannot challenge the sufficiency of the evidence to support his sentence as a matter of right on appeal, and where Defendant "has not filed a petition for writ of *certiorari* seeking review of this issue, it is not properly before this Court." *State v. Hill*, 179 N.C. App. 1, 26, 632 S.E.2d 777, 792 (2006). Thus, we do not consider Defendant's final argument and conclude that Defendant had a fair trial free from prejudicial error.

No Error.

Judges BRYANT and STROUD concur.

1. While this statute has since been rewritten such that one point now yields a prior record level of I, the amendment applies only to offenses committed on or after 1 December 2009. *See* 2009 N.C. Sess. Laws ch. 555, §§ 1, 3. Accordingly, the prior version of N.C. Gen. Stat. § 15A-1340.14(c) governs this case, as Defendant committed the offenses upon which judgment was entered prior to the effective date of this enactment.

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

D.G. II, LLC, PLAINTIFF V. CLIFFORD E. NIX AND JOHNSON BOAT WORKS, DEFENDANTS

No. COA10-882

(Filed 19 April 2011).

1. Contracts— construction of boat—delayed completion

The trial court did not err by granting plaintiff's motion for partial summary judgment and by denying defendants' motion for summary judgment on a breach of contract claim involving the construction of a 57-foot sport fishing boat that was finished late and sold to another buyer. Contrary to defendants' allegation, plaintiff did not declare defendants in default after being notified that completion would be delayed, and did not insist on closing on the specified date.

2. Uniform Commercial Code— breached contract—recovery of deposit

Plaintiff was entitled under the U.C.C. to recover the amount of the purchase price it had already paid (plus interest) for the construction of a sport fishing boat that was not finished on time and was ultimately sold to someone else.

Appeal by defendants from orders entered 2 October and 30 November 2009 by Judge Alma L. Hinton in Dare County Superior Court. Heard in the Court of Appeals 12 January 2011.

Vandeventer Black LLP, by Robert L. O'Donnell and Norman W. Shearin, for plaintiff-appellee.

C. Everett Thompson, II, for defendant-appellants.

CALABRIA, Judge.

Clifford E. Nix ("Nix") and Johnson Boat Works ("JBW") (collectively, "defendants") appeal the trial court's 2 October 2009 order granting D.G. II, LLC's ("plaintiff"), motion for partial summary judgment on the issue of breach of contract and the 30 November 2009 order granting plaintiff's motion for summary judgment on the issue of damages. We affirm.

I. BACKGROUND

On 11 May 2006, John Floyd ("Floyd"), on plaintiff's behalf, entered into a contract ("the contract") with defendants for the con-

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

struction of a 57-foot sport fishing boat (“the boat”) to be used in a charter-for-hire fishing business. Under the terms of the contract, plaintiff was required to pay a deposit in the amount of \$100,000.00 to defendants, and to pay the balance of the purchase price of \$1,250,000.00 within five days of receipt of notice from defendants that the boat was completed. Furthermore, defendants agreed to build and deliver the boat in accordance with the specifications stated in the contract. The contract required defendants to transfer the boat’s title and deliver possession of the boat to plaintiff on or before 31 July 2006. On 11 May 2006, plaintiff deposited \$100,000.00 with defendants.

Prior to 12 July 2006, defendants informed Floyd that the boat would not be completed until 7 September 2006 rather than 31 July 2006, “due primarily to the diversion of subcontractors to other boats under construction by other companies.” As compensation for the delay, defendants proposed to include a “teak deck,” worth approximately \$5,000.00, at no additional cost to plaintiff. Defendants also offered plaintiff the option to terminate the contract and refund its deposit in full. Plaintiff declined to terminate the contract and elected to proceed.

On 14 July 2006, plaintiff delivered a letter to defendants explaining the reasons that defendants’ delay for completion of the boat until September 7, 2006, was “unacceptable” and “disastrous.” Plaintiff made “extensive plans to launch its charter business late in the 2006 season” since the “fishing season will be drawing to an end in the late summer or early fall of this year” Plaintiff also stated that the delay in delivery would prevent its participation “in the Pirate’s Cove Tournament in mid-August” and that “[i]t is hard to overstate the importance of participating in this tournament to [plaintiff’s] business.” Plaintiff reminded defendants that participation in the tournament was discussed at the time the parties signed the contract.

Plaintiff also proposed a counteroffer in the 14 July 2006 letter to defendants and offered defendants one of three options: (1) defendants would pay plaintiff consequential damages of \$100,750.00 and deliver the boat “at a mutually agreeable time” at the price and conditions provided for in the contract; (2) plaintiff would provide an irrevocable letter of credit for the balance of the purchase price owed on the boat on or before 2 August 2006, defendants would exercise the letter of credit when plaintiff took possession of the boat in April 2007, the boat would meet certain additional inspection and certification requirements, and defendants would pay plaintiff the captain’s

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

salary of more than \$4,000.00 per month plus employment expenses until 31 March 2007 or delivery of the boat; or (3) plaintiff would take delivery of the boat during the first week of October 2006 for the purchase price in the contract, along with eight additional specifications to be added to the boat, and payment of two months' captain's salary and expenses.

Prior to receiving a response to the 14 July 2006 letter, plaintiff notified defendants on 31 July 2006 that it was "ready, willing and able" to perform under the contract. However, defendants did not deliver the boat to plaintiff on 31 July 2006, or at any other time. On 3 August 2006, Floyd informed defendants again that plaintiff desired to have the boat.

On 9 August 2006, defendants informed plaintiff that Floyd "made direct threats toward [defendants] concerning litigation that he intends to file and the damages . . . he plans to seek. In other words, [defendants] believe that Mr. Floyd intends to file suit regardless of any proposal for completion of the boat." On 10 August 2006, defendants informed plaintiff, in writing, that defendants "will be terminating the contract based on [plaintiff's] anticipatory breach" On 11 August 2006, plaintiff sent a letter to defendants stating that the boat "must be completed and delivered no later than October 13, 2006" and proposed another counteroffer. Defendants did not respond to the proposal.

On 18 August 2006, defendants informed plaintiff that it was their "understanding" that plaintiff would not be purchasing the boat. Defendants mailed a draft of an agreement which would "terminate[] the relationship" between the parties, and offered to refund the deposit if plaintiff released all claims it may have had against defendants under the contract. Also on 18 August 2006, defendants signed a contract to sell the boat to another buyer named Christopher Schultz ("Schultz") for \$1,475,000.00. The sale price to Schultz was \$125,000.00 more than the price of the boat in the contract between defendants and plaintiff.

On 6 September 2006, plaintiff filed a complaint against defendants in Dare County Superior Court, seeking, *inter alia*, specific performance of the contract, damages in an amount in excess of \$10,000.00, and a restraining order prohibiting defendants from "selling, assigning, or in any way encumbering, damaging or misusing" the boat. Plaintiff also filed an amended complaint, adding Schultz and the broker for the sale, MacGregor Yachts, Inc. ("MacGregor"), as

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

defendants, and sought, *inter alia*, specific performance and damages for lost profits and income as a result of its inability to proceed with its business plan for the operation of a commercial sport fishing enterprise during the period of 1 August 2006 until 18 October 2006. Approximately one month later, Schultz requested that defendants return his deposit for the boat. Later, defendants entered into a second contract with Schultz to sell him the boat for \$1,400,000.00, which was \$50,000.00 more than the amount in the contract between plaintiff and defendants. Subsequently, the trial court granted Schultz's and MacGregor's motion to dismiss.

On 21 December 2006, plaintiff informed defendants that it desired to purchase the boat under the contract and "would drop all charges against [defendants]." Defendants answered and asserted counterclaims for, *inter alia*, breach of contract. On 28 March 2007, plaintiff again expressed interest in purchasing the boat and "resolving outstanding matters regarding various claims at a later date." Plaintiff deposited the amount of \$1,250,000.00 in its attorney's trust account and was prepared to close immediately and take possession of the boat. On 2 July 2007, plaintiff requested that defendants return its \$100,000.00 deposit, but defendants did not respond.

On 1 September 2009, defendants moved for summary judgment, contending that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. On 4 September 2009, plaintiff moved for partial summary judgment "on the breach of contract cause of action" and, in the prayer for relief, asked the court to "hold open for further adjudication the remaining causes of action and damages." In the 2 October 2009 order ("the October 2009 order"), the trial court granted plaintiff's motion for partial summary judgment on its breach of contract claim. The trial court also held open for further adjudication the issue of damages on plaintiff's breach of contract claim.

On 30 November 2009, the trial court entered an order ("the November 2009 order") awarding plaintiff damages against defendants, jointly and severally, in the amount of \$100,000.00, representing plaintiff's deposit toward the purchase price of the boat, together with interest at the rate of eight percent from 10 August 2006 until paid. The trial court denied plaintiff's motion for summary judgment regarding other damages. On 27 April 2010, the jury returned a verdict finding that plaintiff was not entitled to any additional damages from defendants. Defendants appeal the October 2009 partial summary judgment and the November 2009 summary judgment.

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

II. SUMMARY JUDGMENT

Defendants argue that the trial court erred by granting plaintiff's motion for partial summary judgment because "disputed issues of material fact . . . precluded summary judgment in favor of plaintiff" and by denying their motion for summary judgment on the breach of contract claim. We disagree.

A. Standard of Review

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *One Beacon Ins. Co. v. United Mech. Corp.*, — N.C. App. —, —, 700 S.E.2d 121, 122 (2010) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Initial Matters

As an initial matter, we note that defendants do not object to any of the trial court's findings of fact in its order denying their motion for summary judgment on the breach of contract claim.

The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law. Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, [], summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment, []. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones.

Ellis v. Williams, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (internal citations omitted). Since defendants did not contest the trial court's

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

summary of the undisputed facts in the order granting summary judgment, defendants “cannot raise this issue on appeal.” *Elec-Trol, Inc. v. Contractors, Inc.*, 54 N.C. App. 626, 630, 284 S.E.2d 119, 121 (1981). Therefore, our review is “limited to whether the trial court’s conclusions as to [its] questions of law were correct ones.” *Ellis*, 319 N.C. at 415, 355 S.E.2d at 481.

C. Breach of Contract

“The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Ahmadi v. Triangle Rent a Car, Inc.*, — N.C. App. —, —, 691 S.E.2d 101, 103 (2010) (quoting *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000)).

In the instant case, the parties do not dispute that a valid contract existed between them. Therefore, the only issue is whether there was a breach of contract, and if so, which party breached the contract.

1. Plaintiff’s Motion for Partial Summary Judgment

[1] Defendants argue that disputed issues of material fact precluded summary judgment in favor of plaintiff. More specifically, defendants argue that there was a genuine issue of material fact regarding: (1) whether plaintiff allowed defendants a reasonable time to perform after plaintiff declared defendants in default, and (2) whether plaintiff, by not allowing defendants a reasonable time to perform and insisting upon defendants paying plaintiff damages, committed a material breach of the contract. We disagree.

Defendants contend that the “most obvious” issue of material fact that precludes partial summary judgment in favor of plaintiff is whether plaintiff allowed defendants “a reasonable time to deliver the vessel before declaring them in default[.]”

Defendants’ allegations that plaintiff “declar[ed] them in default” are mistaken. The record shows that plaintiff never alleged defendants were in default. Plaintiff filed the complaint for specific performance and damages for breach of contract. The contract provided that the boat would be delivered by 31 July 2006. On 12 July 2006, defendants notified plaintiff that the boat would not be delivered until 7 September 2006. Two days later, plaintiff proposed a counteroffer. On 31 July 2006, plaintiff notified defendants that it was ready, willing, and able to perform under the contract, and was willing to take delivery of the boat after that date in accordance with the terms of the contract.

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

On 10 August 2006, defendants notified plaintiff that they would be terminating the contract and on 18 August 2006, defendants signed a contract to sell the boat to a third party. In December 2006 and March 2007, plaintiff notified defendants that it was still ready, willing, and able to proceed under the contract. These facts show that plaintiff did not declare defendants were in default. Therefore, there are no genuine issues of material fact regarding defendants' default or whether defendants had a reasonable time to perform the contract.

2. Defendants' Motion for Summary Judgment

Defendants argue that the trial court erred in denying their motion for summary judgment on their breach of contract claim because "the undisputed facts reveal that, as a matter of law, plaintiff breached the agreement." We disagree.

a. Anticipatory Repudiation

Defendants contend that plaintiff breached the contract by anticipatory repudiation. We disagree.

"Breach may . . . occur by repudiation. Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises. One effect of the anticipatory breach is to discharge the non-repudiating party from his remaining duties to render performance under the contract. When a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise to perform under the contract because of the anticipatory breach of the first party."

Profile Invs. No. 25, LLC v. Ammons East Corp., — N.C. App. —, —, 700 S.E.2d 232, 235 (2010) (quoting *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (citations and brackets omitted)).

For repudiation to result in a breach of contract, "the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]" *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917) (citation and quotation marks omitted). Furthermore, even

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

a “distinct, unequivocal, and absolute” “refusal to perform” is not a breach “unless it is treated as such by the adverse party.” *Id.* (citation and quotation marks omitted). Upon repudiation, the non-repudiating party “may at once treat it as a breach of the entire contract and bring his action accordingly.” *Id.* (citation and quotation marks omitted). Thus, breach by repudiation depends not only upon the statements and actions of the allegedly repudiating party but also upon the response of the non-repudiating party. See *id.*

Id. at —, 700 S.E.2d at 235-36. Furthermore, when a party to a contract fails to perform within a specified time, that party is liable in damages for the delay unless the delay is excused or waived by the other party. 17A Am. Jur. 2d Contracts § 607 (2010).

In the instant case, there is nothing in the record showing that plaintiff engaged in anticipatory repudiation. On 12 July 2006, defendants notified plaintiff that the “estimated completion date” of the boat was 7 September 2006 and offered plaintiff a modification of the contract. On 14 July 2006, plaintiff proposed a counteroffer to defendants since delivery of the boat on 7 September 2006 would be “disastrous” and “unacceptable.” In its counteroffer, plaintiff put defendants on notice that it would seek damages due to defendants’ delay in the completion and delivery of the boat. On 31 July 2006, plaintiff notified defendants that it was ready, willing, and able to perform under the contract. On 10 August 2006, defendants unilaterally terminated the contract. On 11 August 2006, plaintiff proposed a second counteroffer to resolve its claims for damages for the delay in delivery of the boat. Defendants did not respond to the proposal. On 18 August 2006, defendants signed a contract to sell the boat to a third party, despite plaintiff’s repeated requests for performance.

Defendants have failed to show how plaintiff indicated a refusal to perform. To the contrary, the record indicates that plaintiff was ready, willing, and able to perform under the contract, even after defendants unilaterally terminated the contract and sold the boat to Schultz.

Defendants argue that plaintiff engaged in anticipatory repudiation by notifying defendants that it would seek damages caused by the delay in the completion and delivery of the boat. However, plaintiff did not repudiate the contract, nor did plaintiff excuse or waive defendants’ delay in completing the boat. Instead, plaintiff notified defendants that it planned to pursue a lawful remedy even though it still desired to perform under the contract. Therefore, plaintiff’s pur-

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

suit of damages was not anticipatory repudiation because when defendants failed to perform within a specified time, they became liable in damages for the delay. The only repudiation in this case was by defendants for notifying plaintiff on 10 August 2006, in writing, that they were “terminating the contract based on [plaintiff’s] anticipatory breach”

Since plaintiff did not breach the contract through anticipatory repudiation, defendants were not discharged from their duties to render performance. Defendants failed to show that plaintiff refused to perform in any way under the contract. Therefore, plaintiff was entitled to judgment as a matter of law, and the trial court properly granted summary judgment for plaintiff.

b. Time-of-the-Essence Clause

Defendants also argue that since the contract did not state that the time for delivery of the boat was of the essence, then as a matter of law, time was not of the essence. Therefore, defendants argue that since plaintiff: (1) insisted that defendants were required to perform at the closing date stated in the contract, and (2) declared them in default for failure to do so, then plaintiff breached the contract. We disagree.

The contract in the instant case was a contract for the sale of goods, *i.e.*, a boat. Therefore, North Carolina’s version of the Uniform Commercial Code (“U.C.C.”) applies. N.C. Gen. Stat. § 25-2-102 (2008). The general rule at common law is that, unless a contract expressly provides otherwise, time is not of the essence in the performance of a contract of purchase and sale. *Harris v. Stewart*, 193 N.C. App. 142, 146, 666 S.E.2d 804, 807 (2008). However, for time to be of the essence, it must be so stated in the contract, or the court must “find anything in the contract or in the parties’ actions which demonstrate their intent to make time of the essence.” *Johnson v. Smith, Scott & Assoc., Inc.*, 77 N.C. App. 386, 390, 335 S.E.2d 205, 207 (1985).

Since the UCC does not include an express provision relating to the determination of when time is deemed to be of the essence, the common law rules apply. *See* N.C. Gen. Stat. § 25-1-103(b) (2008) (“[u]nless displaced by the particular provisions of this Chapter, the principles of law and equity . . . supplement its provisions.”). N.C. Gen. Stat. § 25-2-309 provides that when the time for delivery in a contract for the sale of goods is not stated, “the time . . . shall be a reasonable time.” N.C. Gen. Stat. § 25-2-309.

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

In the instant case, although there is no “time-of-the-essence” provision in the contract regarding the date of delivery of the boat, the time for the delivery was on or before 31 July 2006. The contract merely stated that “[t]he parties acknowledge that the vessel is approximately 75% complete at the date of this agreement and completion is estimated to be achieved by July 31, 2006[.]” and that “[c]losing on the transfer of title and delivery of possession of the vessel will occur on or before July 31, 2006, at [defendants’] facility”

On 12 July 2006, defendants notified plaintiff that the “estimated completion date” of the boat was 7 September 2006 and offered plaintiff a modification of the contract. On 14 July 2006, plaintiff proposed a counteroffer to defendants stating that delivery of the boat on 7 September 2006 would be “disastrous” and “unacceptable” because of its inability to proceed with its business plan for the operation of a commercial sport fishing enterprise during the period of 1 August 2006 until 18 October 2006. On 31 July 2006, plaintiff notified defendants that it was ready, willing, and able to perform under the contract, and also that it was willing to take delivery of the boat after that date in accordance with the terms of the contract. Furthermore, in December 2006 and March 2007, plaintiff notified defendants that it was still ready, willing, and able to proceed under the contract. However, on 10 August 2006, ten days after the scheduled completion date in the contract, defendants unilaterally terminated the contract. On 18 August 2006, defendants signed a contract to sell the boat to Schultz. On 24 April 2007, defendants entered into a second contract to sell the boat to Schultz, despite plaintiff’s repeated requests for performance.

These facts demonstrate that plaintiff made statements and took actions manifesting an intent that the closing could occur at a later date and never insisted on closing on the specified closing date of 31 July 2006. These facts further establish that defendants have not shown that there is a genuine issue of material fact that plaintiff required defendants to perform at the closing date stated in the contract. More importantly, plaintiff never declared that defendants were in default for failure to do so. “Because by their words and conduct, defendants indicated that they would no longer honor the contract, plaintiff was excused from its obligation to tender the purchase price and had an action for breach of contract.” *Phoenix Ltd. P’ship v. Simpson*, — N.C. App. —, —, 688 S.E.2d 717, 725 (2009). Therefore, the trial court properly concluded that plaintiff was entitled to judgment as a matter of law.

D.G. II, LLC v. NIX

[211 N.C. App. 332 (2011)]

c. The Deposit

[2] Defendants argue that because they were entitled to judgment as a matter of law on the issue of contract liability, the trial court erred in determining as a matter of law that defendants were required to refund plaintiff's \$100,000.00 deposit along with interest. We disagree.

When a seller breaches a contract for the sale of goods by failing to deliver or by repudiating the contract, the buyer may recover the amount of the purchase price already paid. N.C. Gen. Stat. § 25-2-711(1) (2008). Furthermore:

In an action for breach of contract, . . . the amount awarded on the contract bears interest from the date of breach. [] If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate.

N.C. Gen. Stat. § 24-5(a) (2008). "The legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more." N.C. Gen. Stat. § 24-1.

In the instant case, plaintiff deposited \$100,000.00 of the purchase price of the boat with defendants. Since defendants, as sellers, breached the contract, plaintiff was therefore entitled, under the U.C.C., to recover the amount of the purchase price it had already paid, i.e., \$100,000.00, with interest. The trial court properly determined, as a matter of law, that defendants breached the contract and that plaintiff was entitled to recover its \$100,000.00 deposit. The trial court also properly ordered defendants to refund plaintiff's \$100,000.00 deposit with interest at a rate of eight percent from 10 August 2006 until paid. Defendants' issue on appeal is overruled.

III. CONCLUSION

Defendants unilaterally terminated the contract nine days after the original completion date as contemplated by the contract and subsequently sold the boat to a third party at a substantially higher price. Defendants failed to deliver the boat within a reasonable time and, as such, breached the contract. The trial court properly granted plaintiff's motion for partial summary judgment and denied defendants' motion for summary judgment. The trial court's order is affirmed.

Affirmed.

Judges STROUD and HUNTER, JR., Robert N. concur.

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

PIRAINO BROTHERS, LLC, PLAINTIFF v. ATLANTIC FINANCIAL GROUP, INC.;
MCKEE ESTATES, LLC.; DARRELL AVERY, II; JEFFERY L. AVERY; ROBERT N.
BURRIS, AND BURRIS, MACMILLAN, PEARCE & BURRIS, PLLC; DAVID BAKER;
AND BAKER & BAKER, PLLC; DEFENDANTS

No. COA10-831

(Filed 19 April 2011)

1. Trusts— breach of express trust—civil conspiracy—conversion—summary judgment proper

The trial court did not err in granting summary judgment to the Burris defendants on plaintiff's claims for breach of an express trust and civil conspiracy. Plaintiff failed to preserve the issue of an express trust for appellate review and the Burris defendants did not owe plaintiff a fiduciary duty. Furthermore, plaintiff did not argue that the trial court erred in dismissing plaintiff's underlying conversion claim.

2. Negligence— professional negligence—contributory negligence—evidence admissible—jury instruction proper

The trial court did not err in admitting evidence about and instructing the jury on contributory negligence in plaintiff's professional negligence action against defendant Baker. Contributory negligence is a defense to a claim of professional negligence by attorneys, and the evidence supported a reasonable inference of contributory negligence on plaintiff's part.

3. Negligence— professional negligence—expert testimony—standard of care

Plaintiff's argument in a professional negligence case that defendant Baker's expert was allowed to testify about the standard of care owed to a commercial lender rather than that applicable to an individual investor was rejected. The expert testified that the standard of care he was discussing was applicable to a non-regulated private lender such as plaintiff.

Appeal by Plaintiff from orders entered 16 July and 28 September 2009 and judgment entered 30 December 2009 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2011.

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

Katten Muchin Rosenman LLP, by Richard L. Farley and Rebecca K. Lindahl, for Plaintiff.

Horack, Talley, Pharr & Lowndes, P.A., by Zipporah Basile Edwards and Robert B. McNeill, for Defendants David Baker and Baker & Baker, PLLC.

Poyner Spruill LLP, by T. Richard Kane and Andrew H. Erteschik, for Defendants Robert N. Burris and Burris, MacMillan, Pearce & Burris, PLLC.

STEPHENS, Judge.

On 12 May 2008, Plaintiff Piraino Brothers, LLC, commenced this action against Defendants Atlantic Financial Group, Inc. (“Atlantic”), McKee Estates, LLC (“McKee”), Darrell Avery, II, and Jeffery L. Avery (“Jeff Avery”) (collectively, “the Avery brothers”), Robert N. Burris (“Burris”), Burris, MacMillan, Pearce & Burris, PLLC (“the Burris firm”), David Baker (“Baker”), and Baker & Baker, PLLC. In its amended complaint of 9 September 2008, Plaintiff included claims of: default and breach of contract against Atlantic; breach of trust agreement against Burris and the Burris firm (collectively, “the Burris Defendants”); fraud against Atlantic and Darrell Avery, II; civil conspiracy against Atlantic, McKee, and the Avery brothers; tortious interference with a contract against Jeffery L. Avery and McKee; professional negligence against Baker and his firm (collectively, “the Baker Defendants”); conversion against the Avery brothers and McKee; and unfair and deceptive trade practices against Atlantic, McKee, and the Avery brothers. On 7 October 2008, the Burris Defendants moved for summary judgment. On 8 December 2008, Plaintiff moved to amend its complaint to add additional claims against the Burris Defendants for conversion, civil conspiracy, and aiding and abetting.

On 22 May 2009, the Baker Defendants moved for summary judgment. The same day, the Burris Defendants moved to supplement their motion for summary judgment. On 5 June 2009, the trial court heard both Plaintiff’s and the Burris Defendants’ motions, partially granting Plaintiff’s motion to amend its complaint to add conversion and civil conspiracy claims, denying the addition of the aiding and abetting claim, and granting the Burris Defendants’ motion for summary judgment on the existing claims. The Burris Defendants then moved for summary judgment on the new claims, which the trial court granted on 28 September 2009. The claims against the remaining Defendants were tried at the 28 September 2009 Civil Session of

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

Mecklenburg County Superior Court. The jury returned the following verdicts: in favor of Plaintiff on its unfair and deceptive trade practices and civil conspiracy claims against Atlantic, McKee, and the Avery brothers; in favor of Plaintiff on its conversion claims against McKee and the Avery brothers; and in favor of Plaintiff on its claim for deficiency against Atlantic. On these verdicts, the jury awarded Plaintiff damages totaling \$7,100,001.00 plus prejudgment interest. In addition, although the jury found Baker professionally negligent, it also found Plaintiff contributorily negligent.

On 30 December 2009, the trial court entered judgment in favor of Plaintiff on Plaintiff's claims for conversion, civil conspiracy, and unfair and deceptive trade practices, and in favor of Baker on Plaintiff's claim for professional negligence. Plaintiff appeals. As discussed below, we affirm.

This case arises from a land development project gone awry. Giusto and Enrico Piraino are brothers whose company manufactures and supplies frozen Italian foods. In 2005, the Piraino brothers met the Avery brothers. Darrell Avery's company, Atlantic, had a contract to purchase real property in Union County which it planned to develop as residential lots. However, Atlantic lacked the financial wherewithal to execute this plan. Darrell Avery suggested that the Piraino brothers invest in the project, and, following negotiations, Baker formed Piraino Brothers, LLC, which then contracted with Atlantic on the property transaction. The Burris firm served as Atlantic's attorneys in the matter.

After this initial transaction closed successfully, Darrell Avery told Guisto Piraino that Atlantic had a contract to buy from William Davis Cauthen ("Cauthen") twenty-seven acres on McKee Road in Mecklenburg County ("the property") for \$2,800,000, and that a national builder was interested in developing it. Darrell Avery asked Plaintiff to fund this project, and, encouraged by the success of the initial transaction, Plaintiff agreed. Plaintiff then asked Baker to review the draft contract ("the agreement") prepared by the Burris firm on behalf of Atlantic.

Unknown to Plaintiff, Atlantic's contract to purchase the property was actually for \$1,800,000 rather than \$2,800,000. In addition, Plaintiff and Baker did not know that, on 18 August 2005, the Burris firm had prepared an assignment of Atlantic's contract for the property to McKee, an entity the Burris firm had formed in South Carolina days earlier. On the same day, the Burris firm conducted an unfunded

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

closing with McKee and Cauthen, anticipating that Cauthen would receive \$1,800,000 from the funds to be provided by Plaintiff.

The draft agreement between Atlantic and Plaintiff provided that, using a portion of the funds from Plaintiff, “Atlantic or its designee” would acquire the property from Cauthen. Baker repeatedly asked that the words “or its designee” be removed from the contract, but the Burris firm refused to do so. All drafts of the agreement provided that the funds would be wired by Plaintiff to the Burris firm “IN TRUST” before disbursement. When the Burris firm emailed the final contract to Baker, the phrase “or its designee” remained, as Baker pointed out to Plaintiff. Baker advised the Piraino brothers that they could strike through the words if they wished to do so. Instead, without making any changes to the agreement, Plaintiff wired the money to the Burris firm’s trust account.

Although the Burris firm had not received a signed agreement from Plaintiff, Burris immediately disbursed the funds to McKee. McKee funded the previous closing with Cauthen for \$1,800,000, and transferred the property to Atlantic for \$2,800,000. Atlantic then executed a \$2,800,000 promissory note and first-priority deed of trust in favor of Plaintiff. The Burris firm then sent copies of these documents to Baker. Burris testified that he also sent a copy of the settlement statement, which showed the flip through McKee, to Baker. However, Baker testified at trial that he did not receive it.

After the land transfer was completed, in November 2005 and February 2006, Atlantic requested and received draws on construction funds from Plaintiff. However, after seeing little progress at the development, Plaintiff refused further requests for funds. In late 2006, Giusto Piraino spoke to a real estate agent about finding a buyer for the property. The agent reviewed the public records and informed Giusto Piraino about the flip through McKee. He also discovered that, although Plaintiff had paid \$1,400,000 in construction funds to Atlantic, less than \$80,000 of that sum was used to develop the property. Atlantic had spent the remainder of the money on luxury vehicles, televisions, and watches. This lawsuit followed Plaintiff’s receipt of this information.

Plaintiff raises two issues in this appeal, arguing that the trial court erred in (I) granting summary judgment for the Burris Defendants on Plaintiff’s claims of breach of an express trust and civil conspiracy, and (II) admitting expert testimony on the issue of Plaintiff’s contributory negligence and submitting this issue to the jury. As discussed below, we affirm on both issues.

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

I

[1] Plaintiff first argues that the trial court erred in granting summary judgment to the Burris Defendants because there are genuine issues of material fact on Plaintiff's claims of breach of an express trust and civil conspiracy. We disagree.

In reviewing the trial court's decision to grant a motion for summary judgment, we consider

whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997). Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. *Id.*

Bruce-Terminix Co. v. Zurich Ins. Co., 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Further,

[i]n a motion for summary judgment, the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) [p]roving that an essential element of the opposing party's claim is nonexistent; or 2) [s]howing through discovery that the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hines v. Yates, 171 N.C. App. 150, 157, 614 S.E.2d 385, 389 (2005) (internal quotation marks and citations omitted). "On appeal, an order allowing summary judgment is reviewed de novo." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Plaintiff first contends that there is a genuine issue as to whether the Burris Defendants breached an express trust. Plaintiff contends an express trust was created when it wired funds for the purchase of

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

the property to the Burris firm. However, Plaintiff did not raise the issue of an express trust when the Burris Defendants' motion for summary judgment was heard in the trial court. Instead, Plaintiff argued two other theories in opposing the motion for summary judgment: (1) that the Burris Defendants did not adhere to the standard of care in disbursing the funds, and (2) that the actions of the Burris Defendants were the proximate cause of Plaintiff's losses.

Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount' " in the appellate courts. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5-6 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); see also *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988) (holding that where [the] defendant relied on one theory at trial as basis for written motion to suppress and then asserted another theory on appeal, "no swapping horses" rule applied); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. N.C.R. App. P. 10(b)(1) (2002). "The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal." *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)), *disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991).

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002). Because Plaintiff presents a different theory on appeal than it argued at trial, this argument is not properly preserved. *Id.* at 124, 573 S.E.2d at 686. Thus, we do not consider or address Plaintiff's arguments on the existence and breach of an express trust.

Plaintiff also contends that summary judgment was not proper because the agreement was, at best, ambiguous as to whether the Burris Defendants were allowed to disburse funds to McKee as part of the real estate flip. Specifically, Plaintiff asserts that expert witnesses disagreed about the meaning of the word "designee" in the agreement. However, Guisto Piraino stated in his deposition that, although Plaintiff could have conditioned disbursement on specific terms, it failed to do so.

This Court considered a similar situation in *Noblott v. Timmons*, 177 N.C. App. 258, 628 S.E.2d 413 (2006). In *Noblott*, the plaintiffs were

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

leasing a house from the Timmonses with an option to purchase. *Id.* at 259, 628 S.E.2d at 414. Following disputes regarding the lease, the defendant attorneys agreed to represent the Timmonses and receive the plaintiffs' monthly rental payments on behalf of the Timmonses. *Id.* at 259-60, 628 S.E.2d at 414. "After several months' rental payments had accumulated in defendant[attorney]s' trust account, the Timmonses requested [the] defendant[attorney]s to disburse the funds to them[,] and after consulting the State Bar, the "defendant [attorney]s disbursed the funds to their clients. [The d]efendant [attorney]s did not disclose this disbursement to [the] plaintiffs." *Id.* at 260, 628 S.E.2d at 414. The trial court granted summary judgment to the defendant attorneys and the plaintiffs appealed, contending the defendant attorneys "should: (1) not have disbursed the rental proceeds to the Timmonses; (2) have disclosed the fact that they disbursed the funds to the Timmonses; and (3) have informed [the] plaintiffs' attorney of the status of the pending foreclosure actions." *Id.* at 262, 628 S.E.2d at 415. The plaintiffs also argued that a fiduciary obligation arose when they relied on the defendant attorneys' status as members of the legal profession to have them "receive and distribute their monies in accordance with the Trust Agreement reached between the [p]laintiffs, the Timmonses, and the [attorney d]efendants." *Id.* at 262-63, 628 S.E.2d at 415. This Court affirmed the trial court, noting that the defendant attorneys represented the Timmonses, owed a fiduciary duty to the Timmonses, and held the funds for the benefit of the Timmonses. *Id.* at 263, 628 S.E.2d at 415-16. In addition, we held that the defendant attorneys were obligated under Rule 1.15-2(m) of the North Carolina State Bar Rules of Professional Conduct to disburse the plaintiffs' rental payments to the Timmonses upon request. *Id.* at 263, 628 S.E.2d at 416. "A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled." *Id.* at 263, 628 S.E.2d at 415 (quoting North Carolina State Bar Rules of Professional Conduct, Rule 1.15-2(m)).

Similarly, here, the Burris Defendants represented Atlantic, not Plaintiff, and owed Atlantic, not Plaintiff, a fiduciary duty. Under Rule 1.15-2(m), the Burris Defendants were required to disburse the funds at the direction of their client Atlantic. The Burris Defendants did not owe a duty of care to Plaintiff because, as Plaintiff acknowledges, they had no attorney-client relationship with Plaintiff. The Courts of this State have held attorneys liable for actions that impact non-client third parties in only a few limited situations, none of which is present here. *See Title Ins. Co. of Minn. v. Smith Debnam Hibbert & Pahl,*

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

119 N.C. App. 608, 459 S.E.2d 801 (1995), *affirmed and modified in part*, 342 N.C. 887, 467 S.E.2d 241 (1996) (duty applies where the attorney renders a title opinion upon which the non-client is entitled to rely); *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354 (1984) (duty applies where there is a complete unity of interests between the attorney's client and the non-client). We conclude that the trial court properly granted summary judgment to the Burris Defendants on this claim. Plaintiff's argument is overruled.

Plaintiff also argues that the trial court erred in granting summary judgment to the Burris Defendants on its claim for civil conspiracy. "The elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Privette v. University of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989) (citations omitted). It is well established that "there is not a separate civil action for civil conspiracy in North Carolina." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005). Instead, "civil conspiracy is premised on the underlying act." *Harris v. Matthews*, 361 N.C. 265, 273, n.2, 643 S.E.2d 566, 571, n.2 (2007). Where this Court has found summary judgment for the defendants on the underlying tort claims to be proper, we have held that a plaintiff's claim for civil conspiracy must also fail. *Strickland v. Hedrick*, 194 N.C. App. 1, 19, 669 S.E.2d 61, 73 (2008); *Espósito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 747, 641 S.E.2d 695, 698 (2007); *Harvey, supra*.

Here, the underlying tort claim Plaintiff asserts in its brief is conversion.¹ However, Plaintiff does not argue error by the trial court in dismissing its conversion claim against the Burris Defendants. Because the underlying tort claim was dismissed, the trial court properly granted summary judgment to the Burris Defendants on Plaintiff's ancillary civil conspiracy claim. This argument is overruled.

II

[2] Plaintiff next argues that the trial court erred in admitting evidence about and instructing the jury on contributory negligence in its action against Baker for professional negligence.² Thus, Plaintiff contends that it is entitled to a new trial against Baker on damages. We disagree.

1. Plaintiff alleged underlying torts of fraud, conversion, breach of trust and unfair and deceptive trade practices in its complaint.

2. In the trial court, Baker raised contributory negligence as a defense to Plaintiff's claim of professional negligence.

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

When instructing the jury in a civil case, the trial court has the duty to explain the law and apply it to the evidence on the substantial issues of the action. N.C. Gen. Stat. § 1A-1, Rule 51 (1990). *Pallet Co. v. Wood*, 51 N.C. App. 702, 703, 277 S.E.2d 462, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 393 (1981). Pursuant to this duty, the trial court must instruct on a claim or defense if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense. *Id.* at 703, 277 S.E.2d at 463-64. Conversely, it is error for the trial court to instruct on a claim or defense where the evidence, when viewed in the light most favorable to the proponent, does not support a reasonable inference of such claim or defense.

Wooten v. Warren, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994). Further, we review a jury instruction

contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citations and quotation marks omitted).

Contributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action. *Hahne v. Hanzel*, 161 N.C. App. 494, 588 S.E.2d 915 (2003), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004). The definition of contributory negligence is well-established:

Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Id. at 498, 588 S.E.2d at 917 (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965)). “Contributory negligence ‘is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the com-

PIRAINO BROS., LLC v. ATL. FIN. GRP., INC.

[211 N.C. App. 343 (2011)]

plaint to produce the injury of which the plaintiff complains.’” *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 278-79, 536 S.E.2d 349, 354 (2000) (quoting *Watson v. Storie*, 60 N.C. App. 736, 738, 300 S.E.2d 55, 57 (1983)).

Here, the evidence tended to show that the Piraino brothers met the Avery brothers and engaged in an initial, successful real estate investment with them, but never investigated the Avery brothers’ business or real estate background and experience. The Piraino brothers also failed to check the Avery brothers’ credit or criminal records or ask for references. Such investigations would have revealed Darrell Avery’s two prior bankruptcies and the existence of a lawsuit filed against him by a bank for default on a real estate development loan. In any event, the Avery brothers did tell the Piraino brothers that they had no money to finance the real estate developments they sought to pursue. Yet, the Piraino brothers failed to investigate the value of the property, which was their only collateral on the loan to Atlantic, by having it appraised or even checking the tax records. Plaintiff also failed to ask for a written development plan or to review planning authority approval for the project as proposed by Atlantic. Plaintiff ignored the advice of Baker to get an appraisal of the property, impose escrow requirements, or strike the language about a designee from the contract with Atlantic. These failures were particularly significant where the Piraino brothers had been involved in numerous previous real estate transactions, and Giusto Piraino had overseen all financial matters for his family food distribution company over a period of some twenty years. Further, Giusto Piraino had served on the board of directors and the loan committee for Carolina Commerce Bank for a year prior to the investment at issue here. In that capacity, Giusto Piraino had reviewed various loan documents on a regular basis and was familiar with risk management practices. This evidence, in the light most favorable to Baker, supported a reasonable inference of contributory negligence on Plaintiff’s part before and during its employment of Baker, and thus, the jury instruction was proper.

[3] We also reject the related argument by Plaintiff that Baker’s expert was allowed to testify about the standard of care owed to a commercial lender rather than that applicable to an individual investor. In fact, the expert testified that the standard of care he was discussing was applicable to a non-regulated private lender such as Plaintiff. Plaintiff’s arguments on these issues are overruled.

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

In sum, we conclude that the trial court did not err in granting summary judgment to the Burris Defendants on Plaintiff's claims of breach of an express trust and civil conspiracy or in admitting evidence about and instructing the jury on Plaintiff's contributory negligence in relation to its claim of professional negligence against Baker. The orders and judgment of the trial court are

AFFIRMED.

Judges GEER and ERVIN concur.

A.C. JONES, PLAINTIFF v. LIAM WALLIS, VIRIDIS BUILDING, INC., RICHARD M. GREENE, AS TRUSTEE AND ESCROW AGENT, AND AMIEL J. ROSSABI, AS TRUSTEE AND ESCROW AGENT, DEFENDANTS

No. COA10-349

(Filed 19 April 2011)

1. Process and Service—service of process—due diligence—service by publication—compliance with statutory requirements

The trial court did not abuse its discretion in denying defendant's motion to set aside an entry of default against him in a construction loan case. Plaintiff exercised due diligence in attempting to locate defendant for purpose of service of process and plaintiff complied with all the statutory requirements for service of process by publication.

2. Appeal and Error— execution proceedings—issue rendered moot

Defendant's argument that the trial court erred in denying his motion to dismiss execution proceedings against him in a construction loan case was rendered moot where the Court of Appeals determined that the trial court properly denied defendant's motion to set aside the entry of default and properly granted summary judgment against defendants.

Appeal by defendants Liam Wallis and Amiel J. Rossabi from orders entered 17 June 2009 and 5 November 2009 by Judges Catherine C. Eagles and Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 13 October 2010.

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

*J. Patrick Adams and Joseph B. Bass III, for plaintiff-appellee.**Forman Rossabi Black, P.A., by Amiel J. Rossabi, Gavin J. Reardon, and Michael C. Taliercio, for defendants-appellants.*

STEELMAN, Judge.

Where Jones exercised “due diligence” in attempting to locate Wallis for purposes of service of process and Jones complied with all the statutory requirements for service of process by publication, the trial court did not err in denying Wallis’ motion to set aside the entry of default against him. Where the trial court properly denied Wallis’ motion to set aside the entry of default and properly granted summary judgment against Wallis and Rossabi, any issues concerning the execution proceedings are rendered moot.

I. Factual and Procedural History

On 20 September 2004, A.C. Jones (“Jones”) and Liam Wallis (“Wallis”) entered into an agreement to construct homes on lots six and ten of Haw River Plantation, in Rockingham County, North Carolina. Jones was to provide a line of credit to build the homes. This was secured by a deed of trust on the two lots and a promissory note both executed by Viridis Building (“Viridis”), of which Wallis was the president. Attorney Jodi Ernest prepared the note and deed of trust. Wallis and Viridis never made timely interest payments on the note, and failed to repay the principal when it was due.

In late 2006 and early 2007, well after full payment on the note was due on 20 September 2005, the State of North Carolina began negotiating to buy all of the lots in Haw River Plantation. While attempting to secure payment of the note during the negotiation process, Jones was informed that Viridis never had title to lots six and ten of Haw River Plantation, and that he did not have a valid lien on the property. On 20 June 2008, J. Patrick Adams (“Adams”), Jones’ attorney, sent a letter demanding payment in full to Viridis and Wallis at 921 Greenwood Drive, Greensboro, North Carolina and 114 S. Westgate Drive, Suite D, Greensboro, North Carolina. The entire Haw River Plantation property was eventually sold to the State of North Carolina, and approximately \$3,000,000 of the proceeds from the sale were placed in trust with defendants Richard M. Greene (“Greene”), attorney for Chartwell Homes, Inc. (of which Wallis was president), and Amiel J. Rossabi (“Rossabi”), attorney for Wallis.

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

On 16 January 2009, Jones filed a complaint against Viridis, seeking payment of sums due under the note, together with attorneys' fees. Wallis was sued individually for the sums due under the note under a piercing the corporate veil theory and also for misrepresentations made concerning the validity of the lien on lots six and ten. Greene and Rossabi were sued as escrow agents holding the proceeds of the sale of Haw River Plantation based upon Wallis' claim that he was entitled to some or all of the escrowed funds. By letter dated 16 January 2009, Adams requested that Rossabi, as counsel for Wallis and Viridis, accept service on behalf of his clients. Rossabi failed to respond to this request. On 16 January 2009, a summons was issued for Wallis and Viridis, through Wallis as its registered agent, at 2511 Patriot Way, Unit D, Greensboro, North Carolina. The Guilford County Sheriff's Department unsuccessfully attempted to serve this summons on three different occasions in February of 2009. The return of service showed that no one was living at that address. On 20 February 2009 an alias and pluries summons was issued for Wallis and Viridis at 921 Greenwood Drive, Greensboro, North Carolina. Adams personally went to the Greenwood address, but was unable to ascertain Wallis' location from the then current residents. On 23 February 2009, a second alias and pluries summons was issued. Based upon this summons, service of process by publication was commenced. On 13 April 2009, Jones filed a notice of service of process by publication and an affidavit in support of service by publication with the Clerk of Superior Court of Guilford County as to Wallis. The affidavit documented that the Sheriff of Guilford County was unable to locate Wallis at the 921 Greenwood Drive, Greensboro address, and the 2511 Patriot Way, Unit D, Greensboro address. It further stated the 921 Greenwood property was foreclosed in April of 2008. Counsel for Jones was unable to locate an address for Wallis on the Internet. A copy of the complaint was mailed to Rossabi, Wallis' counsel on 16 January 2009. A copy of the notice of service of process by publication was not mailed to Wallis because his address was not known and could not be ascertained with reasonable diligence. Default was entered against Wallis and Viridis on 15 April 2009 by the Clerk of Superior Court.

On 24 March 2009, Greene filed an answer and motion to dismiss the claims against him, which he served on Wallis by certificate of service directed to 3125 Kathleen Avenue, Unit 105, Greensboro, North Carolina. On 30 March 2009, Rossabi filed a motion to dismiss, which he did not serve on Wallis. On 1 June 2009, Wallis filed a motion to set aside the entry of default. On 17 June 2009, Wallis'

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

motion to set aside the entry of default was denied, and summary judgment was entered against Wallis and Viridis. A writ of execution was issued against Wallis and Viridis on 22 October 2009. On 2 November 2009, judgment was entered against Greene in favor of Jones by consent. This consent judgment awarded to Jones a constructive trust on the proceeds from the sale of Haw River Plantation held by Greene as trustee and escrow agent to the extent that Wallis was entitled to any of those proceeds. On 5 November 2009, summary judgment was entered against Rossabi granting Jones a constructive trust upon the funds held by Rossabi as trustee and escrow agent for Wallis. Wallis' motion to dismiss the execution proceedings was also denied on 5 November 2009. On 24 November 2009, Wallis and Rossabi appealed the orders entered by the trial court on 17 June 2009 denying Wallis' motion to set aside the entry of default and granting partial summary judgment against Wallis. Wallis and Rossabi also appealed the orders entered on 5 November 2009 by the trial court granting summary judgment against Rossabi and denying Wallis' motion to dismiss the execution proceedings.

II. Motion to Set Aside Entry of Default

[1] In his first argument, Wallis contends the trial court erred in denying his motion to set aside the entry of default against him, because his address was ascertainable through "due diligence" and Jones did not comply with all statutory requirements for service of process by publication. We disagree.

A. Standard of Review

"An entry of default may be set aside '[f]or good cause shown.'" *Brown v. Lifford*, 136 N.C. App. 379, 381, 524 S.E.2d 587, 588 (2000) (quoting N.C. Gen. Stat. § 1A-1, Rule 55(d)). "A trial court's determination of 'good cause' to set aside an entry of default will not be disturbed on appeal absent an abuse of discretion." *Id.* at 382, 524 S.E.2d at 589 (citation omitted). "A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citation omitted). If a default judgment is void due to a defect in service of process, the trial court abuses its discretion if it does not grant a defendant's motion to set aside entry of default. *Connette v. Jones*, 196 N.C. App. 351, 354, 674 S.E.2d 751, 753 (2009) (citing *Cotton v. Jones*, 160 N.C. App. 701, 586 S.E.2d 806 (2003)).

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

B. Due Diligence

Service of process on Wallis was obtained by publication. Rule 4(j1) of the North Carolina Rules of Civil Procedure provides for service of process by publication:

(j1) *Service by publication on party that cannot otherwise be served.*—A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C. Gen. Stat. § 1A-1, Rule 4 (2009).

Wallis contends that Jones failed to exercise the “due diligence” required by Rule 4(j1) prior to serving Wallis by publication. We disagree.

“Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper.” *Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516 (citations omitted). “The public record is generally regarded as being reasonably available, and this Court has consistently attached a level of significance to whether or not the public record has been inspected in order to ascertain an appropriate

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

address for service of process.” *Barclays American/Mortgage Corp. v. BECA Enterprises*, 116 N.C. App. 100, 104, 446 S.E.2d 883, 886 (1994) (citations omitted). This Court has held that there is no “restrictive mandatory checklist for what constitutes due diligence” for purposes of service of process by publication; “[r]ather, a case by case analysis is more appropriate.” *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980), *disc. review denied*, 301 N.C. 87 (1980).

In *Emanuel v. Fellows*, plaintiff attempted to serve defendant at the address shown in the Durham telephone directory. *Id.* at 346-47, 267 S.E.2d at 371-72. When the sheriff was unable to serve defendant at that address, counsel for plaintiff called the number. *Id.* Upon being advised that the number was no longer in service, counsel called directory assistance, and was advised that there were no other listings for defendant. *Id.* Defendant’s insurance carrier was contacted, but they could provide no other address for defendant. *Id.* A copy of the summons, complaint, and notice of service of process by publication were mailed to defendant’s insurance carrier. *Id.* Upon his motion to dismiss, defendant contended that service by publication was not proper, citing a laundry list of things plaintiff should have done in the exercise of “due diligence.” *Id.* These included interviewing defendant’s neighbors at his address, contacting the realtor selling the property, interviewing the deputy sheriff who attempted service, and contacting government agencies, including the post office, the state department of transportation, the register of deeds, and the clerk of court. *Id.*

This Court rejected these arguments, recognizing that a defendant can always come up with a list of possible lines of inquiry that a plaintiff did not undertake. Rather, we adopted a case by case analysis of whether a plaintiff acted with “due diligence” and found in *Emanuel* that plaintiff had “acted with due diligence in attempting to determine defendant’s address, whereabouts or usual place of abode.” *Id.*

In the instant case, Wallis and Viridis set forth a number of things that they contend plaintiff should have done to accomplish “due diligence.” These include searching Division of Motor Vehicle records; use of Lexis or a similar fee-based search engine that searches multiple public databases; locate addresses for Wallis’ wife and children in Guilford County; inquire of Greene or Rossabi for Wallis’ current address; attempt service at the Kathleen Avenue address used by Greene; or attempt service at the Westgate Drive address used by Jones in his demand letter of 20 June 2008. We note that Rule 4(j1)

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

requires “due diligence,” not that a party explore every possible means of ascertaining the location of a defendant.

We further note that Wallis’ motion to set aside the entry of default is not verified by Wallis. Nowhere in the motion or in the affidavit of Keith Black (Rossabi’s law partner) attached to this motion, does it state where Wallis was living at the time Jones was attempting to effect service, or give an address where service could have been attained. The motion acknowledges that the law firm of Forman Rossabi Black was representing Wallis, and that Jones’ counsel mailed a copy of the complaint to Wallis’ counsel. The motion then disingenuously asserts that Jones’ counsel failed to exercise “due diligence” by not requesting that Wallis’ counsel provide him with Wallis’ address, when Rossabi had already refused to accept service.

In determining whether Jones acted with “due diligence,” we look to the steps actually undertaken by Jones to ascertain the address of Wallis. The steps undertaken include: (1) attempted service of Wallis at his last known address, 921 Greenwood Drive; (2) searching public records to find the address of 2511 Patriot Way; (3) attempted service on Wallis at 2511 Patriot Way; (4) Internet search for Wallis; (5) counsel for Jones went personally to 921 Greenwood Drive address and talked with current residents; (6) determined from the public records that the 921 Greenwood Drive property had been foreclosed; and (7) sent copy of complaint to Wallis’ attorney and requested that he accept service. We hold that under the case by case approach set forth in *Emanuel v. Fellows*, Jones’ actions constituted “due diligence” justifying the use of service of process by publication as to defendants Wallis and Viridis.

Further, a plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of “due diligence.” This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful. Nothing in Wallis’ motion remotely suggests that these suggested steps would have been successful in effecting service on Wallis. Rather, the record suggests that they would not have succeeded. On 27 August 2009, Wallis filed a motion to claim exempt property from execution with the court. This motion asserted that he was a “CITIZEN OF US & RESIDENT OF KENTUCKY,” and that his address was “UNKNOWN, ACCEPTS SERVICE THROUGH HIS ATTY MICHAEL TALIERCIO” (another attorney with Rossabi’s law firm).

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

Based upon the facts of this case, we hold that the trial court did not abuse its discretion in denying Wallis' motion to set aside the entry of default.

This argument is without merit.

C. Notice of Publication

Wallis further argues that under North Carolina Rule of Civil Procedure 5(a) Jones was required to serve the notice of service of process by publication as to Wallis upon Greene and Rossabi. Wallis contends that Jones failed to comply with all statutory requirements for service by publication, and that this defect required that the trial court grant his motion to set aside the entry of default. We disagree.

Rule 5(a) states in part:

Every order required by its terms to be served, *every pleading subsequent to the original complaint* unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties

N.C. Gen. Stat. § 1A-1, Rule 5(a) (2009) (emphasis added). Rule 5(b) states in part “[a] certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4.”

Rule 4(j1) states in part:

If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. *The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.*

N.C. Gen. Stat. § 1A-1, Rule 4(j) (emphasis added).

“The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). The first step in determining a statute's purpose is

JONES v. WALLIS

[211 N.C. App. 353 (2011)]

to examine the statute's plain language. *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

State v. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004). We hold that Jones complied with both North Carolina Rules of Civil Procedure 4 and 5 based upon the plain language of those statutes.

Rule 5 was intended to address orders, pleadings, and other papers *subsequent to the original complaint*. Wallis' argument is addressed to the service of the original complaint, via publication. Rule 5 is not applicable to service of a complaint by publication. Rule 4(j1) states that notice of service by publication should be mailed to "the party" being served, but does not mention other parties to the lawsuit. We hold that the language of North Carolina Rules of Civil Procedure 4 and 5 is clear and unambiguous, and does not require service of notice of service of process by publication upon every party to the lawsuit. Notice of service of process by publication only needs to be mailed to the party being served by publication. This is only required if that party's post office address can be discovered with reasonable diligence.

This argument is without merit.

II. Execution Order

[2] In his second argument, Wallis contends the trial court erred in denying his motion to dismiss the execution proceedings against him because they were held months before entry of final judgment in violation of North Carolina Rule of Civil Procedure 62(a). We disagree.

Since we have held that the trial court properly denied Wallis' motion to set aside the entry of default and properly granted summary judgment against Wallis and Rossabi, any issues concerning the execution proceedings are rendered moot.

As was acknowledged by the parties at oral argument, the remaining issues raised in this appeal are also moot, and are not addressed in this opinion.

AFFIRMED.

Judges BRYANT and ERVIN concur.

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

STATE OF NORTH CAROLINA v. MATTHEW LEE BECKELHEIMER

No. COA10-203

(Filed 19 April 2011)

1. Evidence— prior incident—adolescent sexual encounter

The trial court erred in a prosecution for first-degree sexual offense and indecent liberties by admitting testimony of an incident twelve years earlier involving the victim's half-brother. Sexual exploration with a child in the same general age range is quite different from a sexual act by force by a 27 year old man upon an eleven year old child.

2. Evidence— prior conduct—erroneous admission prejudicial

There was prejudice in a prosecution for first-degree sexual offense and indecent liberties in the erroneous admission of testimony about a prior incident where there was no physical evidence and the jurors had to decide whether to believe the victim or defendant.

Appeal by defendant from judgments entered on or about 7 August 2009 by Judge D. Jack Hooks, Jr. in Superior Court, Chatham County. Heard in the Court of Appeals 13 September 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jill A. Bryan, for the State.

Thomas R. Sallenger, for defendant-appellant.

STROUD, Judge.

Matthew Lee Beckelheimer (“defendant”) appeals from a trial court’s judgment convicting him of one count of first-degree sexual offense and three counts of taking indecent liberties with a child. For the following reasons, we reverse defendant’s conviction and grant him a new trial.

I. Background

On 23 June 2008, defendant was indicted on three counts of taking indecent liberties with a child and one count of statutory sexual offense. On 1 June 2009, defendant in a superseding indictment was indicted for one count of first-degree sexual offense. On 4 May 2009, defendant filed a “motion to exclude evidence of uncharged crimes,

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

bad acts, or misconduct[,]” pursuant to N.C. Gen. Stat. § 8C-1, Rules of Evidence 401, 402, 403, and 404(b), arguing that the trial court should prohibit the State from introducing testimony from the victim’s half-brother, “that he and the Defendant engaged in sexual behavior in the mid-nineties, when the defendant was a teenager.” On 3 August 2009, defendant was tried on these charges during the Criminal Session of Superior Court, Chatham County.

The State’s evidence tended to show that the minor victim and his mother went to defendant’s house in July 2007. In July 2007, defendant was 27 years old and the minor victim was about 11 years old. Defendant invited the minor victim into his bedroom to play a video game. The minor victim was sitting on the floor and defendant told the minor victim to get onto the bed “because it was softer.” Once the minor victim was on the bed, defendant climbed on top of the minor victim but “pretended like he was asleep for a little while.” Defendant then held the minor victim down, stuck his hand down the minor victim’s pants, unzipped the minor victim’s pants, and “kissed” the minor victim’s penis. The minor victim testified that defendant had touched him two other times prior to this incident. The minor victim stated that those instances involved defendant scratching or rubbing his back, again pretending like he was asleep, and then putting his hand “halfway on [the minor victim’s] leg and halfway on [his penis]” while their clothes were on. The minor victim testified that he was born in July of 1996.

The trial court permitted, over defendant’s objection, the minor victim’s half-brother Ronnie Thomas Branson, age 24 at the time of trial, to testify regarding a sexual encounter he had with defendant when Mr. Branson was about 12 years old. Mr. Branson testified that before his thirteenth birthday, he would spend the night at defendant’s house and “ride bicycles, play video games [and] computer games.” While at defendant’s house, Mr. Branson and defendant would also look at pornography on the computer. Mr. Branson then testified that “after a little while of that [defendant] would turn [the lights] off and [they] would go to bed [together].” Once in bed, defendant would begin rubbing Mr. Branson’s penis then perform oral sex on Mr. Branson “by sucking [his] penis.” Mr. Branson also testified that defendant “would [also] try to put his fingers in my butt.” Mr. Branson then testified that he also performed oral sex on defendant. Mr. Branson testified that he spent the night with defendant on more than one occasion and that defendant was “maybe three or four years older [than him].” Mr. Branson stated that this happened before 1997 but he did not testify as to an exact date that this contact with defend-

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

ant occurred. Mr. Branson testified that his date of birth was 10 August 1984. Defendant's date of birth was 24 February 1980.

Defendant testified that in the summer of 2007, the minor victim and his mother came to his house to visit defendant's mother. At the time, defendant lived with his mother, and his niece at the same residence. When the minor victim came over, he would play on the computer and defendant also played video games with him in defendant's room. Defendant testified that during the last weekend in July 2007 he went to a funeral in West Virginia and did not return until 3 August 2007. Defendant also testified that after learning of the minor victim's allegation he was "in complete disbelief." Defendant testified that he did not "engage in sexual activity with Tommy Branson in 1995 or 1996 or at any time[;]" he did not "fondle [the minor victim] in the summer of 2007 or at any time[;]" and he did not "perform oral sex on [the minor victim] on July 28, 2007 or at any time."

On 7 August 2009, a jury found defendant guilty of three counts of taking indecent liberties with a child and one count of first-degree sexual offense. The trial court consolidated the three convictions for taking indecent liberties with a child and sentenced defendant to 16 to 20 months imprisonment for those convictions. The trial court also sentenced defendant to a concurrent term of 192 to 240 months imprisonment for the first-degree sexual offense conviction. Defendant gave oral notice of appeal in open court.

II. Admission of Mr. Branson's testimony at trial

[1] Defendant first contends that the trial court erred in admitting testimony pursuant to N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403 regarding sexual behavior between Mr. Branson, the victim's half-brother, and defendant, which happened some 10 to 12 years in the past.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007), in pertinent part, states that,

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Our Supreme Court has further noted that

Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

of character evidence against the accused As we stated in *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986), “[t]he dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts.” *Id.* at 430, 347 S.E.2d at 15; *see also* 1A John H. Wigmore, *Evidence* § 58.2 (Peter Tillers ed. 1983) (“[Character evidence] is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused’s guilt of the present charge.”).

State v. al-Bayyinah, 356 N.C. 150, 154, 567 S.E.2d 120, 122-23 (2002). “[T]he use of evidence under Rule 404(b) is guided by two constraints: similarity and temporal proximity.” *State v. Bowman*, 188 N.C. App. 635, 640, 656 S.E.2d 638, 644 (2008) (citation and quotation marks omitted). “[O]nce a trial court has determined the evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence.” *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citations and quotation marks omitted); N.C. Gen. Stat. § 8C-1, Rule 403 (2007). “That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision.” *Stevenson*, 169 N.C. App. at 800-01, 611 S.E.2d at 209 (citation and quotation marks omitted).

A. Rule 404(b) similarity and remoteness in time

Defendant argues that because of both the lack of similarity and the remoteness in time between the acts alleged by the minor victim and Mr. Branson’s testimony, the trial court erred in admitting this testimony. We must first consider the similarity of the acts, for if the acts were not sufficiently similar, Mr. Branson’s testimony should not have been admitted.

Defendant argues that the sexual encounters as described by Mr. Branson were dissimilar to the facts of this case. The State counters that “there were striking similarities between the sexual acts involving the Defendant and Tommy Branson and the offenses charged.” “Under

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

Rule 404(b) a prior act . . . is similar if there are . . . particularly similar acts which would indicate that the same person committed both.” *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (citations and quotation marks omitted). The similarities cannot be “generic to” the sexual acts alleged. *al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. “A mere similarity in results is not a sufficient basis upon which to receive evidence of other offenses. Instead, there must be such a concurrence of common features that the assorted offenses are naturally explained as being caused by a general plan.” *State v. Dixon*, 77 N.C. App. 27, 34, 334 S.E.2d 433, 438 (1985) (citations omitted), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). “Where, however, the State fails to show sufficient similarity between the acts beyond those characteristics inherent to [the acts], evidence of the prior acts is inadmissible under Rule 404(b).” *State v. Dunston*, 161 N.C. App. 468, 473, 588 S.E.2d 540, 544 (2003) (citation and quotation marks omitted).

Mr. Branson testified that he was under 13 years old when the alleged sexual contact with defendant occurred and that defendant was around three or four years older than Mr. Branson; he spent the night at defendant’s house and they would ride bicycles, and played video and computer games; they looked at pornography on the computer, then turned off the lights, and got into defendant’s bed at night; defendant would start rubbing him in his “private” and then defendant would perform oral sex on Mr. Branson; defendant also attempted to put his fingers in Mr. Branson’s rectum; Mr. Branson also performed oral sex on defendant; and that this happened more than one time.

In contrast, State’s evidence showed that defendant was 27 years old and the minor victim was age 11 at the time of the alleged sexual contact in July 2007. The minor victim testified that defendant invited the minor victim to his room to play a video game; defendant invited the minor victim onto his bed during the daytime; defendant then got on top of the minor victim, pretending like he was asleep; and defendant then held the minor victim down, while he unzipped his pants and kissed his penis. The minor victim also testified that defendant had touched him two prior times, consisting of defendant rubbing his back and then putting his hand on the minor victim’s penis, while they both had their clothes on. Beyond the fact that both Mr. Branson and the minor victim are males who played video games with defendant at his residence and the characteristics “inherent to” touching or oral sex, *see id.*, there is little similarity in the two events. Most importantly, there was an age difference of about 16 years between defend-

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

ant and the minor victim at the time of the alleged sexual contact by defendant, but both defendant and Mr. Branson were minor children, about three or four years apart in age, when the acts Mr. Branson testified to occurred. The acts between Mr. Branson and defendant were apparently consensual. Sexual exploration with a child in the same general age range is quite a different thing than a sexual act perpetrated by force by a 27 year old man upon an 11 year old child. In most, if not all, cases addressing admissibility of evidence of prior sexual conduct by a defendant which occurred with another victim years prior to the crime at issue, the age difference and relationship between the defendant and the persons sexually abused were similar, in addition to similarities in the actions of the defendant. In particular, in cases of sexual abuse of children, the defendants were adults at the time of the prior acts and the evidence of prior similar acts dealt with other acts by a defendant upon similarly-aged minor victims. *See State v. Delsanto*, 172 N.C. App. 42, 615 S.E.2d 870 (2005) (evidence presented that the adult defendant committed sexual acts with his two three-year-old grandchildren and similar prior sexual acts with his niece when she was “about four years old.”); *State v. Smith*, 152 N.C. App. 514, 568 S.E.2d 289 (2002) (evidence presented of defendant’s sexual encounters with a 15 year old babysitter “admitted under Rule 404(b) of the North Carolina Rules of Evidence for the purpose of showing an absence of mistake on the part of defendant, defendant’s unnatural attraction to young girls, and a common plan or scheme to take advantage of young girls in situations where he had parental or adult responsibility over them” in prosecution for sex offense and indecent liberties with stepdaughter at age 12); *State v. Frazier*, 344 N.C. 611, 476 S.E.2d 297 (1996) (evidence presented that the adult defendant committed sexual acts with his two teenage stepgranddaughters and three prior victims when they were young teenagers); *State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994) (evidence presented that the adult defendant committed sexual acts with his 10 year old daughter and similar prior sexual acts with the victim’s older step-sister when she was “a young girl” around age nine); *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988) (the trial court made findings that the defendant committed sexual acts with his stepdaughter when “she was 12, 13 and 14-years-old” and prior sexual acts “in much the same manner as the victim” with another young girl living in the same residence as the defendant when “she was 11, 12, and 13-years-old”).

In further contrast, there was no reciprocal sexual contact by the minor victim with defendant; defendant did not attempt to put his fin-

STATE v. BECKELHEIMER

[211 N.C. App. 362 (2011)]

gers in the minor victim's rectum; and there is no mention of the use of pornography in the minor victim's testimony. Accordingly, we fail to see a "concurrence of common features" in Mr. Branson's testimony and the alleged charges which would be "naturally explained as being caused by a general plan." *See Dixon*, 77 N.C. App. at 34, 334 S.E.2d at 438.

Because we have determined that the acts as testified to by Mr. Branson were not sufficiently similar to the crime with which defendant was charged, we need not address the issue of remoteness in time. Both similarity and temporal proximity are required for the evidence to be admissible under Rule 404(b) as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2006); N.C. Gen. Stat. § 8C-1, Rule 404(b). As the similarity is lacking, Mr. Branson's testimony should have been excluded.

B. Prejudice

[2] Even if the trial court erred by admission of Mr. Branson's testimony, "[t]o receive a new trial based upon a violation of the Rules of Evidence, a defendant must show that . . . there is a 'reasonable possibility' that without the error 'a different result would have been reached at the trial.'" *State v. Ray*, 364 N.C. 272, 278, 697 S.E.2d 319, 322 (2010) (quoting N.C. Gen. Stat. § 15A-1443(a) (2009)). Given the nature of Mr. Branson's testimony, there is a risk that the jury "convict[ed] defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged." *Jones*, 322 N.C. at 590, 369 S.E.2d at 824. There was no physical evidence of the crimes and the State's case as to the sexual acts was based solely upon the testimony of the minor victim; defendant testified and denied that the acts occurred. The jurors had to decide whether to believe the minor victim or defendant, and Mr. Branson's testimony may have assisted them in making their decision against defendant. Therefore, "there is a 'reasonable possibility' that without the error 'a different result would have been reached at the trial[.]" see *Ray*, 364 N.C. at 278, 697 S.E.2d at 322, and defendant has demonstrated prejudice as to the admission of this evidence. Accordingly, defendant has met his burden, and we reverse defendant's conviction and grant him a new trial. As we have granted defendant a new trial, we need not address any of the other issues raised in his brief on appeal.

NEW TRIAL.

Chief Judge MARTIN and Judge ERVIN concur.

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

SANA KINDLEY WATSON, PLAINTIFF v. KENNETH PRICE, M.D., AND REGIONAL
NEUROSURGERY PLLC, DEFENDANTS

No. COA10-1112

(Filed 19 April 2011)

Medical Malpractice— Rule 9(j)—order extending statute of limitations—not effective—not filed

An order under N.C.G.S. § 1A-1, Rule 9(j) extending the statute of limitations must be filed to be effective and the trial court in this case correctly dismissed the complaint because a Rule 9(j) order that was signed but never filed did not extend the statute of limitations.

Judge HUNTER, Robert C., concurring.

Appeal by Plaintiff from order dated 9 June 2010 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 February 2011.

Bryant, Patterson, Covington, Lewis & Lindsley, P.A., by David O. Lewis, for Plaintiff.

Young Moore and Henderson P.A., by William P. Daniell and Kelly E. Street, for Defendant.

STEPHENS, Judge.

On 29 September 2009, Plaintiff Sana Kindley Watson (“Watson”) filed a complaint in Durham County Superior Court against Defendants Kenneth Price, M.D. (“Dr. Price”) and Regional Neurosurgery PLLC (“Regional”) (collectively, “Defendants”), asserting a medical malpractice claim against Dr. Price and seeking to hold Regional liable for Dr. Price’s alleged malpractice under the theory of *respondeat superior*. In her complaint, Watson alleged that Dr. Price treated Watson between 9 June 2005 and 9 June 2006.

On 18 May 2009, prior to filing her complaint, Watson submitted to the trial court a motion to extend the statute of limitations on her medical malpractice claim pursuant to North Carolina Civil Procedure Rule 9(j). On that same date, Resident Superior Court Judge Orlando F. Hudson, Jr. signed an order granting Watson’s motion and extending the statute of limitations to 2 October 2009; from the record, it appears that Judge Hudson’s Rule 9(j) order was never filed.

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

In December 2009, Defendants filed their answer, which was later amended to include (1) a “Fourth Defense” pleading “the applicable statutes of limitation” “in complete bar to any recovery against them by [Watson]” and (2) a “Fifth Defense and Motion to Dismiss” alleging that Watson “fails to state a claim upon which relief can be granted” and seeking dismissal of Watson’s claim pursuant to North Carolina Civil Procedure Rule 12(b)(6).

On 1 June 2010, Judge Hudson conducted a hearing on Defendants’ motion to dismiss. In an order dated 9 June 2010, Judge Hudson found that “the claims set forth in [Watson’s] action are time-barred”¹ and dismissed Watson’s action with prejudice. Watson gave notice of appeal from the order dismissing her claims on 30 June 2010.

On appeal, Watson argues that Judge Hudson erred by dismissing Watson’s action on the ground that the claims were time-barred. Watson contends that Judge Hudson’s signature on the Rule 9(j) order was effective to extend the statute of limitations, despite the fact that the order was never filed, and, therefore, the filing of the complaint on 29 September 2009 was within the extended statute of limitations, which expired 2 October 2009. Defendants, on the other hand, argue that “the [Rule 9(j) order] was not filed, and therefore it did not serve to extend the statute of limitations.” Accordingly, Defendants argue, the statute of limitations expired on 9 June 2009, nearly three months before Watson filed her complaint.

In support of their arguments, the parties look to North Carolina Civil Procedure Rule 58, which governs “Entry of judgment” and which states as follows: “[A] *judgment* is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.” N.C. Gen. Stat. § 1A-1, Rule 58 (2009) (emphasis added). This Court has previously held that Rule 58 applies to orders, as well as judgments, such that an *order* is likewise entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737-38 (holding that an order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997). However, as Rule 58 simply sets out the requirements for entry of an order and contains no requirement that

1. Although generally a three-year statute of limitations is applicable to medical malpractice actions such as this one, Rule 9(j) allows a plaintiff to move a trial court for a 120-day extension of the statute of limitations to allow the plaintiff additional time to comply with the enhanced pleading requirements imposed on a medical malpractice complainant by Rule 9(j). See N.C. Gen. Stat. §§ 1-52(5), 1A-1, Rule 9 (2009).

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

an order must be entered to be effective, the rule is relevant to this case only insofar as it makes clear that Judge Hudson's Rule 9(j) order was not *entered*, but was merely *rendered*. *Searles v. Searles*, 100 N.C. App. 723, 726, 398 S.E.2d 55, 56 (1990) ("An announcement of judgment in open court constitutes the rendition of judgment, not its entry").² As for the practical difference between rendering and entering in the context of judgments, our Supreme Court long ago stated that

[t]he *rendition* of a judgment is the *judicial act* of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict, the *entry* of it being a *ministerial act* which consists in spreading it upon the record.

Seip v. Wright, 173 N.C. 14, 17, 91 S.E. 359, 361 (1917) (citation omitted) (emphasis added). It has since been held that a *judgment* that has merely been rendered, but which has not been entered, is not enforceable until entry. *Searles*, 100 N.C. App. at 726-27, 398 S.E.2d at 57 (noting that "the judgment is not enforceable as between the parties to this action as it has not been entered"). The question then is whether that rule applicable to judgments is also applicable to the order in this case, *i.e.*, whether the mere judicial act of issuance or rendition of the Rule 9(j) order effectively extended the statute of limitations, or whether the ministerial act of filing or entry was necessary to give the order force.³

Addressing this question by turning to the rule granting the trial court the power to extend the statute of limitations in medical malpractice cases, it appears that filing is unnecessary and that mere issuance is sufficient. As provided by Rule 9(j),

[u]pon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court . . . *may allow a motion to extend the statute of limitations* for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule,

2. While "rendering" may be a term of art reserved for judgments and not orders, we use that word in the context of orders as it is the recognized counterpart to "entering" and appears to be otherwise synonymous with "issuing" or "pronouncing."

3. We note that North Carolina Rule of Civil Procedure 5(d) provides that "[a]ll orders issued by the court" "shall be filed with the court[.]" N.C. Gen. Stat. § 1A-1, Rule 5(d) (2009). However, while Rule 5(d) requires a Rule 9(j) order to be filed with the court, that rule does not specify a time in which the order must be filed, nor does it provide a sanction for any party's failure to file such an order.

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (emphasis added). Per the clear language of the rule, the trial court need only “allow a motion” in order to extend the statute of limitations. This wording seems to indicate that it is the judicial act of “allowing” the motion, rather than the ministerial act of “entering” the order, that extends the statute of limitations. Compare N.C. Gen. Stat. §§ 1-75.12(a) (“If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party *may enter an order* to stay further proceedings in the action in this State.” (emphasis added)), 5A-23(e) (2009) (“If civil contempt is found, the judicial official *must enter an order* finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.” (emphasis added)). Indeed, it is an oft-cited maxim of statutory construction that *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another. See *Mangum v. Raleigh Bd. of Adjust.*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009). Accordingly, based on the clear language of Rule 9(j), it appears that a Rule 9(j) order extending the statute of limitations is effective as soon as a trial judge allows a motion to extend and regardless of whether the order is filed.

However, despite the language used in Rule 9(j), there is some authority to suggest that an order extending the statute of limitations pursuant to Rule 9(j) is ineffective until that order is filed. In *Webb v. Nash Hospitals, Inc.*, 133 N.C. App. 636, 516 S.E.2d 191, *disc. review denied*, 351 N.C. 122, 541 S.E.2d 471 (1999), the plaintiff-appellants filed a motion pursuant to Rule 9(j) on 19 September 1997, which motion was granted in an order dated 12 September 1997—seven days before plaintiff-appellants’ motion was filed. *Id.* at 638, 516 S.E.2d at 193. The order was then filed on 1 October 1997. *Id.*⁴ In response to defendant-appellees’ argument that the trial court lacked jurisdiction to grant plaintiff-appellants’ motion “because there was no motion pending for the extension of time when the order was signed[,]” this Court held that because the order was not “filed and ‘entered’” until after the motion was “filed and entered,” the court

4. The trial court subsequently granted defendant-appellees’ motion to dismiss the complaint based on plaintiff-appellants’ failure to properly serve the motion on defendant-appellees. *Webb*, 133 N.C. App. at 638, 516 S.E.2d at 193.

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

had jurisdiction to grant the motion. *Id.* at 638-39, 516 S.E.2d at 193. In so holding, the Court cited *Worsham v. Richbourg's Sales and Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (which itself cites *Searles*), for the proposition that “the mere signature on a judgment that has not been entered is an incomplete judgment.” *Id.* The obvious implication from the holding in *Webb* is that the trial court’s order did not effectively grant the Rule 9(j) motion until the order was filed. Accordingly, in this case, pursuant to our holding in *Webb*, we must conclude that Judge Hudson’s Rule 9(j) order did not extend the statute of limitations because the order was never filed.

As further authority to support the conclusion that a Rule 9(j) order must be filed to be effective, we note the following discussion of Rule 58 and its application to orders by the trial court:

A judgment is not enforceable between the parties until it is entered. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. An announcement of judgment in open court constitutes the rendition of judgment, not its entry. Although Rule 58 specifically refers only to judgments, this Court has held that it applies to orders as well. It follows that an order rendered in open court is not enforceable until it is entered, *i.e.*, until it is reduced to writing, signed by the judge, and filed with the clerk of court.

West v. Marko, 130 N.C. App. 751, 755-56, 504 S.E.2d 571, 573-74 (1998) (internal citations and quotation marks omitted). While the conclusion that an order is not enforceable until entry does not necessarily follow from the premise that the Rule 58 entry requirements apply to both orders and judgments, to the extent this Court in *West* expressly held that orders of the trial court are not enforceable until entry, we find ourselves bound by the conclusion—if not necessarily the logic—of this Court’s prior decision. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Although this decision leaves unanswered questions regarding the effectiveness of a Rule 9(j) order filed after the complaint is filed, whether before or after the expiration of the original statute of limitations, suffice it to say that, in this case, the trial court correctly dismissed Watson’s complaint because there was no effective Rule 9(j) extension order filed in the case. The ruling of the trial court is

AFFIRMED.

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

Judge ERVIN concurs.

Judge HUNTER, Robert C., concurs in a separate opinion.

HUNTER, Robert C., Judge, concurring.

I concur with the majority that *Webb v. Nash Hosp., Inc.*, 133 N.C. App. 636, 639, 516 S.E.2d 191, 193, *disc. review denied*, 351 N.C. 122, 541 S.E.2d 471 (1999), where this Court held that “the mere signature on a judgment that has not been entered is an incomplete judgment[,]” is controlling in the present case. I write separately to point out that the legislature never intended to create a filing requirement for an order granting a plaintiff’s motion to extend the time within which plaintiff must file his or her complaint pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure.

As acknowledged by the majority, the plain language of Rule 9(j) sets forth that a plaintiff must make a motion to extend the statute of limitations prior to the expiration of the applicable statute of limitations and that a superior court judge may allow the motion “for a period not to exceed 120 days” N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009). Therefore, the motion is effective when the order is *allowed*. Rule 9(j) does not mandate that the order be filed with the clerk of court. “When the language of a statute is clear and without ambiguity, ‘there is no room for judicial construction,’ and the statute must be given effect in accordance with its plain and definite meaning.” *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)).

Furthermore, while I agree with the ultimate outcome of the *Webb* case, I disagree with the Court’s application of Rule 58 in that the Court broadened the scope of Rule 58 to apply to an *ex parte* order entered *before an action is commenced*. “[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered.” *Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001). It is my interpretation that Rule 58 only applies to judgments and orders entered subsequent to the filing of a complaint where the defendant is, in many cases, required to take action within a set period of time. Notice is not an issue in this circumstance where an extension of time is granted to file a complaint, but an action has not been instituted.

WATSON v. PRICE

[211 N.C. App. 369 (2011)]

When a plaintiff requests an extension of the statute of limitations, the relevant dates are: (1) the date when the motion was filed, which must be prior to the expiration of the applicable statute of limitations, and (2) the date set by the trial court as the new deadline for filing the complaint. These dates are set out in the trial court's order and only pertain to plaintiff's deadline for filing a complaint; the granting of the order has no effect on potential defendants. Moreover, our Court has clearly held that the order granting a Rule 9(j) extension of time to file the complaint does not have to be served on the potential defendants since a complaint has not been filed. *Timour v. Pitt County Memorial Hosp., Inc.*, 131 N.C. App. 548, 550, 508 S.E.2d 329, 330 (1998), *aff'd per curiam*, 351 N.C. 47, 519 S.E.2d 316 (1999). The implication is that potential defendants are not prejudiced by the lack of notice that an extension has been granted. In fact, all medical professionals subject to a medical malpractice lawsuit are on notice by the plain language of Rule 9(j) that a medical malpractice action must be filed within three years, *or* up to 120 days beyond the three-year deadline should the trial court grant an *ex parte* motion for an extension. There is no practical rationale for service of the order or entry of the order with the clerk of court.

The Court in *Webb* was faced with resolving a narrow issue regarding the authority of the trial court to enter the order for an extension of the statute of limitations when it held that Rule 58 applied and that an order granting an extension under Rule 9(j) must be "entered" to be effective. Clearly, the Court did not contemplate the type of situation currently before us when it made this broad declaration. In sum, the plain language of Rule 9(j) should control in this case, not Rule 58 as applied in *Webb*. In other words, a Rule 9(j) order should be considered effective when *allowed* by the trial court.⁵

5. I recognize that the better practice would be to serve and file the *ex parte* order; however, I do not believe that such actions are required.

STATE v. PELL

[211 N.C. App. 376 (2011)]

STATE OF NORTH CAROLINA v. BEN EARL PELL

No. COA10-415

(Filed 19 April 2011)

1. Sexual Offenders— registration as sex offender—language of statute not unconstitutionally vague

Defendant's argument that the trial court erred in a secret peeping case by requiring him to register as a sex offender was overruled. The language of the applicable statute, N.C.G.S. § 14-202(1), was not unconstitutionally vague.

2. Sexual Offenders— registration as sex offender—no competent evidence defendant a danger to community

The trial court erred in a secret peeping case by requiring defendant to register as a sex offender. There was no competent evidence to support a finding that defendant was a danger to the community, or that his registration would further the purposes of N.C.G.S. § 14-208.5.

Appeal by Defendant from judgment entered 11 September 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

Narron, O'Hale & Whittington, P.A. by John P. O'Hale; Woodruff, Reece & Fortner by Mary McCullers Reece and Michael J. Reece, for Defendant.

BEASLEY, Judge.

Ben Earl Pell (Defendant) was indicted on sixteen counts of felony secret peeping. Defendant entered into a plea bargain with the State, and as part of his sentence was ordered to maintain registration on the North Carolina Sex Offender and Public Protection Registry. From this portion of his sentence, Defendant now appeals. For the reasons stated below, we reverse the trial court's order.

On 21 July, 5 August, and 8 September 2008, Defendant was indicted on sixteen counts of felony secret peeping under N.C. Gen. Stat. § 14-202(d). On 5 August 2009, Defendant entered into an agreement with the State whereby he pled guilty to eight of the counts, and

STATE v. PELL

[211 N.C. App. 376 (2011)]

the other eight counts were dismissed. On 3 September 2009, at the sentencing hearing, the Honorable Thomas H. Lock imposed two consecutive sentences of six to eight months imprisonment, suspended the sentences and placed Defendant on supervised probation for a period of five years. As a condition of his probation, Defendant was ordered to maintain registration on the North Carolina Sex Offender and Public Protection Registry. On 11 September 2009, Defendant filed notice of appeal. On appeal, Defendant argues that: (I) the trial court erred in requiring him to register as a sex offender because the language in N.C. Gen. Stat. 14-202(I) was unconstitutionally vague; and (II) the trial court erred in requiring him to register as a sex offender where there was no competent evidence that he was a “danger to the community,” or that his conviction would further the purposes of N.C. Gen. Stat. § 14-208.5.

As a preliminary matter, we address Defendant’s grounds for appellate review. In *State v. White*, our Court held that the sex offender registration requirement provided in Article 27A was a non-punitive civil regulatory scheme. 162 N.C. App. 183, 193, 590 S.E.2d 448, 455 (2004). Therefore, an appeal from a sentence requiring a defendant to register as a sex offender is controlled by civil procedure. *See State v. Brooks*, — N.C. App. —, —, 693 S.E.2d 204, 206 (2010) (holding that because a satellite-based monitoring hearing is not a criminal proceeding, notice of appeal must be given as is proper in a civil action); *see also State v. Bare*, 197 N.C. App. 461, 467, 677 S.E.2d 518, 524 (holding that the satellite-based monitoring provisions of Article 27A are to be considered “part of the same regulatory scheme as the registration provisions under the same article.”), *disc. review denied*, — N.C. App. —, 702 S.E.2d 492 (2009).

It is well established that a criminal defendant may appeal as a matter of right to the Court of Appeals “[f]rom any final judgment of a superior court” other than those based on a guilty plea, a plea of *nolo contendere*, or cases in which a defendant is convicted of first degree murder and receives a sentence of death. N.C. Gen. Stat. § 7A-27 (a)-(b) (2009). In this case, Defendant specifically appeals from the portion of his sentence requiring him to register as a sex offender. While a defendant is entitled to appeal from a guilty plea in limited circumstances, *see* N.C. Gen. Stat. § 15A-1444(a2) (2009), Defendant’s appeal does not arise from the underlying convictions, therefore these limitations are inapplicable to the current action. Accordingly, Defendant’s appeal is properly before this Court for appellate review.

STATE v. PELL

[211 N.C. App. 376 (2011)]

I.

[1] Defendant first argues that the trial court erroneously required him to register as a sex offender because the applicable statute was unconstitutionally vague. Specifically, Defendant tends to argue that the language of N.C. Gen. Stat. § 14-202(1) is unconstitutionally vague because it does not define “danger to the community.” We disagree.

“Under a challenge for vagueness, the Supreme Court has held that a statute is unconstitutionally vague if it either: (1) fails to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’; or (2) fails to ‘provide explicit standards for those who apply [the law].’” *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)). However, “[s]tatutory language should not be declared void for vagueness unless it is not susceptible to reasonable understanding and interpretation. Mere differences of opinion as to a statute’s applicability do not render it unconstitutionally vague.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 187, 594 S.E.2d 1, 19 (2004) (internal citations and quotations omitted). “We [must] apply the rules of statutory interpretation to discern the meaning of [N.C. Gen. Stat. § 14-202(1)].” *State v. McCravey*, — N.C. App. —, —, 692 S.E.2d 409, 418, *disc. review denied*, — N.C. App. —, 702 S.E.2d 506 (2010).

The interpretation of a statute is governed by the central principle that the intention of the legislature is controlling. *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294 (1975). “Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (internal quotation marks omitted). However, “[i]f a statute is unclear or ambiguous . . . courts must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress.” *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001). Our Court will determine the will of the legislature by:

appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and

STATE v. PELL

[211 N.C. App. 376 (2011)]

other like means[.] Other *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.

In re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978) (internal citations and quotations marks omitted). The statute requiring Defendant to register as a sex offender is not unconstitutionally vague.

Defendant pled guilty to eight counts of the offense of felony secret peeping as prohibited by N.C. Gen. Stat. § 14-202(d) (2009). N.C. Gen. Stat. § 14-202(1) provides that:

When a person violates subsection (d) . . . of this section . . . the sentencing court shall consider whether the person is a danger to the community and whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article as stated in G.S. 14-208.5. If the sentencing court rules that the person is a danger to the community and that the person shall register, then an order shall be entered requiring the person to register.

N.C. Gen. Stat. § 14-202(1) (2009). The statute authorizes sex offender registration if the trial court first determines that: (1) the defendant is a “danger to the community;” and (2) the defendant’s registration would further the purpose of the Article as stated in N.C. Gen. Stat. § 14-208.5 (2009).

The phrase “danger to the community” is not defined by statute and is arguably ambiguous. Therefore, we must turn to statutory construction to determine the will of the legislature. Our General Assembly has recognized that because “sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment[.] . . . protection of the public from sex offenders is of paramount governmental interest.” N.C. Gen. Stat. § 14-208.5. “[T]he twin aims’ of the registration program [are] . . . ‘public safety and protection.” *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009) (internal quotation marks omitted). When examining the purposes of the sex offender registration statute, it is clear that “danger to the community” refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment.

STATE v. PELL

[211 N.C. App. 376 (2011)]

The General Assembly also notes that the efforts of law enforcement officials to protect the community from offenders who commit sexual offenses could be impaired from a lack of information about prior sex offenders who live within their jurisdictions. N.C. Gen. Stat. § 14-208.5. Accordingly, it is the purpose of the sex offender registration program to

assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

Id. The purposes of the sex offender registration are furthered when a defendant's registration would assist law enforcement officials with monitoring potential recidivists.

Though there is no North Carolina authority providing the appropriate standard of review by which we are to analyze the trial court's "danger to the community" determination, we find guidance in a similar satellite-based monitoring case. In *State v. Kilby*, our Court was tasked with determining whether the trial court correctly found that a defendant required the "highest possible level of supervision and monitoring" with regards to satellite-based monitoring. 198 N.C. App. 363, 366, 679 S.E.2d 430, 432 (2009). We held that whether an offender requires the "highest possible level of supervision and monitoring" was not clearly a question of fact or a conclusion of law. *Id.* While a conclusion of law typically requires the application of legal principles to the facts, the statute only provided for the review of factual information for a trial court to determine whether a defendant required the "highest possible level of supervision and monitoring." *Id.* at 366-67, 679 S.E.2d at 432. Accordingly, this Court held that "we [will] review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *Id.* at 367, 679 S.E.2d at 432.

Here, the trial court was required to determine whether Defendant was a "danger to the community." Similar to *Kilby*, N.C. Gen. Stat. § 14-202(1) (2009) provides no legal principles defining "danger to the community." Whether a trial court finds that a defend-

STATE v. PELL

[211 N.C. App. 376 (2011)]

ant poses a risk of engaging in sex offenses following release from incarceration will be based upon a review of the surrounding factual circumstances. Accordingly, this Court will review the trial court's findings to ensure that they are supported by competent evidence, and we review the conclusions of law to ensure that they reflect a correct application of law to the facts. *Id.*

II.

[2] Defendant next argues that the trial court erred in requiring him to register as a sex offender because there was no competent evidence to support a finding that he was a danger to the community, or that his registration would further the purposes of N.C. Gen. Stat. § 14-208.5. We agree.

In this case, the trial court erroneously found that Defendant was a “danger to the community.” In *Kilby*, our Court held that the trial court’s finding that a moderate risk assessment from the Department of Correction, and that the defendant was cooperating with post-release supervision, are insufficient to support a conclusion that an offender required the “highest possible level of supervision and monitoring.” *Id.* at 370, 692 S.E.2d at 434. The applicable satellite-based monitoring statute actually required the trial court to consider a Department of Correction risk assessment before concluding that a defendant required “the highest possible level of supervision and monitoring.” N.C. Gen. Stat. § 14-208.40B(c) (2009). While distinguishable, our holding in *Kilby* offers guidance in the present action.

The record evidence does not support the trial court’s finding that Defendant is a “danger to the community.” As previously discussed, an examination of legislative intent reveals that “danger to the community” only refers to those defendants who pose a risk of engaging in sex offenses following their release from incarceration. Following the administration of several evaluation procedures, the State’s expert witness determined that Defendant represented a low to moderate risk of re-offending. Later at Defendant’s sentencing hearing, the State’s expert acknowledged that the likelihood of Defendant’s re-offending may be even lower after considering a revised risk assessment scale. The trial court also reviewed letters submitted by Defendant’s psychiatrist and counselor. Defendant’s witnesses opined that Defendant’s prior diagnoses of major depression, alcohol abuse, and paraphilia were in remission. This evidence does not support the trial court’s conclusion that Defendant represented a “danger to the community.”

IN RE D.M.

[211 N.C. App. 382 (2011)]

Citing statements made by several of Defendant's victims, the State argues that the record evidence supports a conclusion that Defendant represents a "danger to the community." Victims of a crime are permitted to "offer admissible evidence of the impact of the crime" to be considered during sentencing. N.C. Gen. Stat. § 15A-833 (2009). However, the victims' statements all tended to address the manner in which Defendant committed his past offenses and the effect his actions had on each of their lives. This evidence offered very little in the way of predictive statements concerning Defendant's likelihood of recidivism. Accordingly, the victim impact statements in this case are insufficient to support the trial court's finding that Defendant represented a "danger to the community."

While the language of N.C. Gen. Stat. § 14-202(1) was not so vague as to render it unconstitutional, the record evidence does not support the trial court's conclusion that Defendant represented a danger to the community. Accordingly, we reverse the trial court order requiring Defendant to register as a sex offender.

Reversed and remanded.

Judges McGEE and HUNTER, JR. concur.

IN THE MATTER OF: D.M.

No. COA10-1280

(Filed 19 April 2011)

1. Child Custody and Support—custody awarded to grandmother—no findings or conclusions—father acted inconsistently with parental rights

The trial court erred in awarding permanent custody of a minor child to her maternal grandmother where the court specifically found that neither of the child's parents was unfit to parent and the trial court failed to make any findings of fact or conclusions of law as to whether respondent father had acted inconsistently with his parental rights.

IN RE D.M.

[211 N.C. App. 382 (2011)]

2. Child Custody and Support—order reversed and remanded—findings—reunification—visitation

The Court of Appeals reversed an order granting custody of a minor child to her maternal grandmother and remanded the case to the trial court. On remand, the trial court was to address any efforts made by the Department of Social Services to reunite the child with her father. Furthermore, if the trial court did not return the child to her father's home and instead granted him visitation privileges, the trial court was to set forth the time, place, and conditions of his visitation privileges.

Appeal by respondent-father from order filed 20 July 2010 by Judge Joseph Moody Buckner in District Court, Orange County. Heard in the Court of Appeals 28 February 2011.

No brief filed for petitioner-appellee.

Pamela Newell for appellee-guardian ad litem.

Lisa Skinner Lefler for respondent-appellant.

STROUD, Judge.

Respondent-father appeals from a permanency planning order which granted permanent custody of his daughter to her maternal grandmother. For the following reasons, we reverse.

I. Background

On 9 April 2009, Orange County Department of Social Services ("DSS") filed a juvenile petition alleging eight-year-old Dana¹ was neglected and dependent. Prior to the filing of the juvenile petition, Dana was living with her mother and her half-brother, Bob.² The trial court entered a non-secure custody order placing custody of Dana and Bob with DSS. DSS placed Dana in her maternal grandmother's home. The trial court set a custody review hearing for 16 April 2009.

At the custody review hearing on 16 April 2009, the trial court continued custody and placement authority with DSS. Dana remained placed with her maternal grandmother. The trial court directed DSS to conduct a home study of respondent-father's home and to provide visitation with him at the scheduling and "discretion of the treatment team."

1. Pseudonyms will be used to protect the identity of the minor children.

2. Respondent-father is not Bob's father.

IN RE D.M.

[211 N.C. App. 382 (2011)]

On 4 June 2009, an adjudication and disposition hearing was held, and the order was entered on 10 July 2009. The trial court adjudicated Dana as a “dependent juvenile[] within the meaning and scope of N.C.G.S. 7B-101(9)” and left pending the issue of whether she was a neglected juvenile. The trial court found that the home study of respondent-father was favorable, but that his “DWI, history/pattern of alcohol use and how it would affect his ability to parent . . . require[d] a more thorough assessment” before a placement decision could be made. Again, custody and placement authority was retained by DSS with respondent-father having visitation with Dana “at the discretion of the treatment team.”

DSS reported that on 17 June 2009, DSS changed Dana’s placement from her maternal grandmother’s home to the home of respondent-father. On 3 September 2009 and 7 January 2010, further custody review hearings were conducted by the trial court. At the time of these review hearings, Dana was still in placement with respondent-father and DSS retained custody and placement authority. Respondent-father and Dana’s mother were also ordered to attend custody mediation. The mediation was held on 15 February 2010 but was not successful. On 17 February 2010, DSS removed Dana from respondent-father’s home and placed her again with her maternal grandmother.

A permanency planning hearing was held on 18 March 2010. In its 7 April 2010 order, based on the 18 March 2010 hearing, the trial court ordered the permanent plan to be custody with the maternal grandmother. DSS continued to have custody and placement authority of Dana. Visitation with respondent-father was continued “at the discretion of the treatment team.” The 7 April 2010 order also set another review hearing for 15 April 2010, but following continuances, the case was next heard on 17 June 2010. After the 17 June 2010 permanency planning hearing, in its 20 July 2010 order, the trial court awarded permanent custody to Dana’s maternal grandmother and visitation for respondent-father. Respondent-father appeals.³

3. Respondent-father’s notice of appeal lists three separate orders and one motion which was never heard before the trial court. But in respondent-father’s brief, he states “[f]rom the 17 June 2010 order, the respondent-father” appeals. Respondent-father’s arguments in his brief also address the 17 June 2010 hearing upon which the 20 July 2010 order is based. Accordingly, we will only consider the 20 July 2010 order on appeal. *See* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”)

IN RE D.M.

[211 N.C. App. 382 (2011)]

II. 20 July 2010 Order

[1] Respondent-father argues that the trial court erred in awarding custody of Dana to her maternal grandmother in violation of his constitutional rights as a parent. Respondent-father does not challenge the trial court's findings of fact but argues that the court did not consider or make proper conclusions of law as to his constitutionally protected rights as a parent.

This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions of law are reviewable *de novo* on appeal.

In re P.O., — N.C. App.—, —, 698 S.E.2d 525, 530 (2010) (citation and quotation marks omitted).

"[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B. *See generally In re B.G.*, 197 N.C. App. 570, 571-74, 677 S.E.2d 549, 551-52 (2009) (applying the constitutional analysis in a juvenile petition case).

Dana was adjudicated *only* as dependent, and DSS's juvenile petition alleging dependency was based solely on the actions of Dana's mother and not respondent-father. Here, the trial court specifically found that "[n]either parent is unfit to parent[.]" and thus it could not award permanent custody to the maternal grandmother in the absence of findings of fact and conclusions of law that respondent-father had acted inconsistently with his constitutional rights as a parent. *See id.* Because the trial court failed to make *any* findings of fact or conclusions of law as to whether respondent-father had acted inconsistently with his parental rights, it erred in awarding permanent custody to Dana's maternal grandmother. *See id.* Accordingly, we reverse the 20 July 2010 order awarding custody of Dana to her maternal grandmother.

IN RE D.M.

[211 N.C. App. 382 (2011)]

[2] Furthermore, although we are reversing the 20 July 2010 order due to the trial court's failure to consider whether respondent-father had acted inconsistently with his constitutionally protected status as a parent, we will address some other issues which will likely recur on remand, in the hope of avoiding future appeals in this case. First, in the 20 July 2010 order, the trial court made findings of fact regarding the "reasonable efforts" of DSS to reunite Dana with her parents. N.C. Gen. Stat. § 7B-101(18) defines "reasonable efforts" as

[t]he diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

N.C. Gen. Stat. § 7B-101(18) (2009). The North Carolina statutes do not include a definitive listing of the services which may be provided as a part of "reasonable efforts," but there is a

federal regulation setting forth a nonexclusive list of services which *may* satisfy the "reasonable efforts" requirement. 45 C.F.R. § 1357.15(e)(2) (1996) (*i.e.*, crisis counseling, individual and family counseling, services to unmarried parents, mental health counseling, drug and alcohol abuse counseling, homemaker services, day care, emergency shelters, vocational counseling, emergency caretaker, and "other services which the agency identifies as necessary and appropriate").

In re Helms, 127 N.C. App. 505, 512 n.3, 491 S.E.2d 672, 677 n.3 (1997) (emphasis in original).

In the 20 July 2010 order, the trial court made the following findings as to "reasonable efforts":

Prior to this hearing, reasonable efforts to achieve the permanent plan of reunification for the juvenile were made by OCDSS including, but not limited to, the following:

- a. Case management services to . . . [mother] and the children in the home.

IN RE D.M.

[211 N.C. App. 382 (2011)]

- b. Referral to substance abuse treatment and mental health services through Horizons.
- c. Referral to the Center for Child and Family Health for mental health services for [Dana].
- d. Referral to Kidscope for a behavioral evaluation for [Bob].
- e. Referral to the CDSA for a developmental evaluation for [Bob].
- f. Transportation to and supervision of visits between [Dana], [Bob], and . . . [mother].
- g. Consistent communication with . . . [mother's] treatment providers and support system.
- h. Home studies of and placement with children's respective fathers.

The trial court made similar findings as to “reasonable efforts” in the adjudication and review orders prior to the 20 July 2010 order. Yet these findings do not address any efforts made in regard to respondent-father beyond the home study which resulted in Dana’s placement with him, and these actions obviously occurred prior to Dana’s placement with respondent-father and thus prior to DSS’s removal of Dana from respondent-father’s home. While findings regarding “reasonable efforts” are not required at the permanency planning hearing, such findings should have been made regarding respondent-father at the previous hearings when DSS retained custody of Dana. *See* N.C. Gen. Stat. § 7B-507 (2009) (“(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order: . . . (2) Shall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile”). Although Dana was initially removed from her mother, she was later placed by DSS with respondent-father. Yet once Dana was placed with him, our record does not demonstrate any “reasonable efforts” by DSS to assist him in parenting Dana or to address the conditions which caused DSS to remove her from his home. Although DSS developed a case plan and made “reasonable efforts” to assist Dana’s mother, it appears that both the trial court and DSS failed to consider that “reasonable efforts” may be required as to both parents where, as here, DSS had removed the minor child from

IN RE D.M.

[211 N.C. App. 382 (2011)]

both parents separately. As best we can tell from the record before us, it is possible that findings regarding “reasonable efforts” may be absent because DSS did not make any “use of preventive or reunification services” in regard to respondent-father. N.C. Gen. Stat. § 7B-101(18).

Second, we note that several orders, including the 17 July 2010 order which granted permanent custody of Dana to her maternal grandmother, leave visitation with respondent-father entirely in the discretion of “the treatment team.” However, the trial court must set the parameters of visitation. *See In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005) (“The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child. . . . In the absence of findings that the parent has forfeited their right to visitation or that it is in the child’s best interest to deny visitation the court should safeguard the parent’s visitation rights by a provision in the order defining and establishing the time, place, and conditions under which such visitation rights may be exercised.” (citation, quotation marks, and brackets omitted)). On remand, if the trial court does not return Dana to respondent-father’s home and instead grants him visitation privileges, the trial court should set forth “the time, place, and conditions” of his visitation privileges. *Id.*

III. Conclusion

For the reasons stated above, we reverse the 20 July 2010 order and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges HUNTER, JR. Robert N. and ERVIN concur.

IN RE V.M.

[211 N.C. App. 389 (2011)]

IN THE MATTER OF: V.M.

No. COA10-1558

(Filed 19 April 2011)

Juveniles— disposition order—required findings

A juvenile disposition order was remanded where the order did not demonstrate that the court considered the factors listed in N.C.G.S. § 7B-2501.

Appeal by juvenile from orders entered 7 May 2010 and 27 August 2010 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 11 April 2011.

Roy Cooper, Attorney General, by Jennifer M. Jones, Assistant Attorney General, for the State.

Peter Wood, for juvenile-appellant.

MARTIN, Chief Judge.

Juvenile V.M. (“the juvenile”) appeals from the trial court’s 7 May 2010 adjudication order and 27 August 2010 dispositional order. The juvenile argues that the trial court erred by imposing a Level 3 disposition without making sufficient findings of fact to demonstrate that it considered the factors listed in N.C.G.S. § 7B-2501(c). We agree, and reverse the trial court’s dispositional order and remand the matter for a new dispositional hearing.

On 15 January 2010, the trial court adjudicated the juvenile delinquent of felonious larceny, based on the juvenile’s admission. The terms of the juvenile’s admission provided that the State would dismiss one count of felonious breaking or entering and two counts of simple assault. On the same date, the trial court entered a Level 2 disposition and placed the juvenile on probation for 12 months.

In March 2010, three new delinquency petitions were filed against the juvenile for felonious larceny of a debit card, disorderly conduct, and simple affray. On 23 March 2010, Court Counselor David A. Hughey filed a motion for review of the juvenile’s probation. In the motion, Mr. Hughey alleged that the juvenile had violated his probation due to the petition alleging that the juvenile committed disorderly conduct and that the juvenile had been suspended from school on two occasions and had three unexcused absences from school.

IN RE V.M.

[211 N.C. App. 389 (2011)]

On 7 May 2010, the juvenile signed another transcript of admission, in which the juvenile admitted to the probation violation and to the new misdemeanor charges of public disturbance and simple affray. In return for the juvenile's admissions, the State agreed to dismiss the petition for felonious larceny. The juvenile also indicated that he understood that a Level 3 disposition could be imposed given his delinquency history level, and that such a level was the most restrictive disposition possible.

The matter came on for disposition on 27 August 2010. Mr. Hughey informed the trial court that the juvenile was eligible for confinement to a youth development center. The trial court then stated:

[The juvenile] has five delinquency history points; is that right? And he's (inaudible) by his (inaudible) disposition of the probation violation and the misdemeanor offenses; is that correct, Mr. Hughey?

....

Madame Clerk, I'll incorporate the Office of Juvenile Justice—what's the—is the felony larceny the most—what's the most—

Mr. Hughey informed the trial court that the juvenile was currently on probation for felonious larceny, and the trial court confirmed that the larceny charge was the most serious charge that the juvenile was facing. In open court, the trial court ordered that the juvenile be confined to a youth development center until his eighteenth birthday.

The trial court entered a Juvenile Level 3 Disposition and Commitment Order based on the juvenile's probation violation. In that order, the trial court checked a box indicating that it found that "[t]he juvenile has been adjudicated for a violent or serious offense and Level III is authorized by G.S. 7B-2508." The trial court also checked boxes indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment. The written order provided that the juvenile was to be confined to a youth development center for an indefinite commitment. The juvenile gave written notice of appeal on 2 September 2010.

On appeal, the juvenile's sole contention is that the trial court failed to make sufficient findings of fact in its Juvenile Level 3 Disposition and Commitment Order to demonstrate that it considered

IN RE V.M.

[211 N.C. App. 389 (2011)]

the factors listed in N.C.G.S. § 7B-2501(c). The State concedes that the instant case is indistinguishable from prior cases in which we have reversed similar dispositional orders when the trial court failed to make such findings.

At the outset, we note that we have previously held that juvenile probation revocation proceedings are dispositional, and subject to the statutory provisions governing juvenile delinquency dispositions. *In re D.J.M.*, 181 N.C. App. 126, 130-31, 638 S.E.2d 610, 613 (2007); *In re O'Neal*, 160 N.C. App. 409, 412-13, 585 S.E.2d 478, 481-82, *disc. review denied*, 357 N.C. 657, 590 S.E.2d 270 (2003). Accordingly, a juvenile dispositional order entered after a probation revocation “shall be in writing and shall contain appropriate findings of fact and conclusions of law.” N.C. Gen. Stat. § 7B-2512 (2009).

If the trial court finds that the juvenile has violated the conditions of his probation:

[T]he court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. In the court's discretion, part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508.

N.C. Gen. Stat. § 7B-2510(e) (2009). In considering the dispositional options outlined in N.C.G.S. § 7B-2508, however, the trial court must consider the following factors:

- (1) The seriousness of the offense;
- (2) The need to hold the juvenile accountable;
- (3) The importance of protecting the public safety;
- (4) The degree of culpability indicated by the circumstances of the particular case; and
- (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2009).

Further, we have previously held that the trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c)

IN RE V.M.

[211 N.C. App. 389 (2011)]

factors in a dispositional order entered in a juvenile delinquency matter. *In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004).

In this case, the trial court's dispositional order does not contain findings addressing the N.C.G.S. § 7B-2501(c) factors. In the pre-printed portions of the dispositional order, the trial court found that the juvenile had previously been given a Level 2 disposition on 15 January 2010, had been placed on probation, and had violated the terms of his probation. As we indicated above, the trial court checked boxes indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment, and that "[t]he juvenile has been adjudicated for a violent or serious offense and Level III is authorized by G.S. 7B-2508."

The trial court's order contains no additional findings of fact, including in the area designated as "Other Findings," which includes the following instructions:

(Continue on attached pages if necessary. State any findings regarding the seriousness of the offense(s); the need to hold the juvenile accountable; the importance of protecting the public; the degree of the juvenile's culpability; the juvenile's rehabilitative and treatment needs; and available and appropriate resources.)

The trial court did not attach any additional findings of fact to its order demonstrating that it considered the seriousness of the offense, the need to hold the juvenile accountable, the importance of protecting the public, the degree of the juvenile's culpability, the juvenile's rehabilitative and treatment needs, or the available and appropriate resources. As such, we hold the trial court's written order contains insufficient findings to allow this Court to determine whether it properly considered all of the factors required by N.C.G.S. § 7B-2501(c). For that reason, we must reverse the trial court's dispositional order and remand this matter for a new dispositional hearing.

Reversed and remanded.

Judges ELMORE and GEER concur.

WILLIAMS v. OWENS

[211 N.C. App. 393 (2011)]

JOANN D. WILLIAMS, PLAINTIFF v. JAMES R. OWENS d/B/A OWENS BACKHOE AND
LANDSCAPING, DEFENDANT

No. COA10-390

(Filed 19 April 2011)

1. Pretrial Proceedings— motion for leave to amend complaint—negligence action—no abuse of discretion

The trial court did not abuse its discretion in denying plaintiff's motion for leave to amend her complaint in a negligence action where plaintiff's amended complaint sought to add two new parties to her action after the statute of limitations had expired.

2. Pretrial Proceedings— motion to dismiss—negligence action—properly allowed

The trial court did not err in granting defendant's motion to dismiss in a negligence action where the trial court properly denied plaintiff's motion for leave to amend her complaint to add two new parties to the action after the statute of limitations had expired.

Appeal by plaintiff from order entered on or about 26 October 2009 by Judge Cy A. Grant, Sr. in Superior Court, Wilson County. Heard in the Court of Appeals 26 October 2010.

Nile K. Falk, for plaintiff-appellant.

Poyner Spruill LLP, by Timothy W. Wilson, for appellee-intervenor.

STROUD, Judge.

The trial court denied plaintiff's motion to amend her complaint. As plaintiff's amended complaint sought to add two new parties to her action after the statute of limitations had run, we affirm.

I. Background

On 13 May 2009, plaintiff filed a verified complaint against defendant James R. Owens d/b/a Owens Backhoe and Landscaping for negligence. On or about 15 July 2009, Charlene T. Owens filed motions to dismiss and an answer with affirmative defenses. Ms. Owens's SECOND DEFENSE AND MOTION TO DISMISS was for failure to join a necessary party pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure because as Ms. Owens alleged, defendant James R. Owens

WILLIAMS v. OWENS

[211 N.C. App. 393 (2011)]

had died on 17 January 2007, and she had formerly been the executrix of his estate, which had been closed on 9 October 2007. On 3 September 2009, plaintiff filed a MOTION FOR LEAVE TO AMEND COMPLAINT to add Alan T. Owens and Charlene T. Owens as necessary parties. Plaintiff sought to add Ms. Owens as a party in her personal capacity and not as personal representative of the estate of Mr. Owens. On 26 October 2009, the trial court denied plaintiff's motion to amend and granted Ms. Owens's motions to dismiss. Plaintiff appeals.

II. Motion to Amend

[1] Plaintiff contends that “the trial court erred by denying [her] motion for leave to amend [her] complaint by failing to properly follow N.C. Gen. Stat 1A-1, Rules 15(a) and (c) and 25(a) and N.C. Gen. Stat. § 28A-19-3(i). (Original in all caps.)

[O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

Delta Environmental Consultants of N.C. v. Wyson & Miles Co., 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999).

Plaintiff alleges she was injured on 14 May 2006 by the negligence of James Owens, and she filed her original complaint on or about 13 May 2009. Plaintiff's original complaint brought a cause of action for negligence, which has a three-year statute of limitations. *See Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) (“The statute of limitations for personal injury due to negligence is three years.” (citing N.C. Gen. Stat. § 1-52(16))), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994). Plaintiff filed for leave to amend her complaint on 3 September 2009, and thus plaintiff's amended complaint was not filed within the statute of limitations. Furthermore, plaintiff's amended complaint does not relate back to the date of the original complaint as it seeks to add entirely new parties. *See Estate of*

WILLIAMS v. OWENS

[211 N.C. App. 393 (2011)]

Fennell v. Stephenson, 354 N.C. 327, 334-35, 554 S.E.2d 629, 633-34 (2001) ("This Court has directly and explicitly stated that while Rule 15 of the North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties."). As the statute of limitations had run, it would have been futile for the trial court to allow plaintiff to amend her complaint to add new parties; therefore, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend her complaint. *See Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 ("Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture."), *disc. review denied*, 311 N.C. 401, 319 S.E.2d 271 (1984).

Plaintiff's brief cites to N.C. Gen. Stat. § 1A-1, Rules 15(a) and (c) and 25(a) and N.C. Gen. Stat. § 28A-19-3(i) as her legal support for why the trial court abused its discretion in denying her motion to amend. However, none of the law cited by plaintiff is applicable. *See generally* N.C. Gen. Stat. § 1A-1, Rule 15(a) and (c) (concerning amendments and relations back which is not applicable as plaintiff is attempting to amend her complaint to add new parties); N.C. Gen. Stat. § 1A-1, Rule 25(a) (allowing personal representative to be substituted for a party upon death which is not applicable as statute of limitations ran before plaintiff attempted to add personal representative); N.C. Gen. Stat. § 28A-19-3(i) (2005) (addressing claims actually filed against a decedent's estate).

Here, plaintiff sued an individual who was deceased; the statute of limitations ran; and then plaintiff sought to add two other individuals to her suit but she has never sought to add the estate or Ms. Owens in her capacity as former executrix of the estate. As the statute of limitations had run, the trial court did not abuse its discretion in denying plaintiff's motion to amend her complaint to add two entirely new parties as the amendment would have been futile. *See Lee* at 326, 315 S.E.2d at 328. This argument is overruled.

III. Motions to Dismiss

[2] Plaintiff also contends that the trial court erred in granting Ms. Owens's motions to dismiss. Plaintiff relies upon her previous arguments for this contention. As we have already concluded that plaintiff's arguments regarding her motion to amend fails, this argument must also fail. This argument is overruled.

WILLIAMS v. OWENS

[211 N.C. App. 393 (2011)]

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order denying plaintiff's motion to amend and granting Ms. Owens's motions to dismiss.

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

EASTERN CAROLINA INTERNAL MEDICINE, P.A., PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE

No. COA09-1278

(Filed 3 May 2011)

1. Hospitals and Other Medical Facilities— certificate of need—review by CON Section

The Department of Health and Human Services did not err when considering a certificate of need (CON) for a mobile MRI by focusing on the ways in which the decision of the CON Section was alleged to be unlawful rather than systematically asking whether the CON Section's decision exceeded its authority and then moving through each of the other grounds for reversal set out by statute.

2. Hospitals and Other Medical Facilities— certificate of need—burden of proving error—presumption that agency performed duties

The Department of Health and Human Services when considering a certificate of need (CON) for a mobile MRI did not presume that the CON Section acted in accord with applicable law when it noted that there was a presumption that an administrative agency has properly performed its official duties.

3. Hospitals and Other Medical Facilities— certificate of need—standard of review—not arbitrary and capricious

The Department of Health and Human Services did not err by reviewing a Certificate of Need Section decision by an arbitrary and capricious standard instead of considering all of the grounds for error outlined in N.C.G.S. § 150B-23(a).

4. Hospitals and Other Medical Facilities— certificate of need—application—criteria not satisfied—denied rather than approved conditionally

The Department of Health and Human Services did not err by concluding that a certificate of need (CON) application must satisfy all of the review criteria in N.C.G.S. § 131E-183(a) and that an applicant was not entitled to a CON as a matter of law if the application did not conform with any of the criteria. In this case, many deficiencies were found in the application and the record

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

contained no indication that the Department acted unreasonably by simply denying the application rather than approving it subject to a condition.

5. Hospitals and Other Medical Facilities— certificate of need—ALJ findings—sufficient

The Department of Health and Human Services sufficiently complied with N.C.G.S. § 150B-34(c) in its decision regarding a certificate of need for a mobile MRI. The Department clearly indicated which of the administrative law judge's findings it adopted and which it rejected before it stated that the rejected findings were unsupported by the clear preponderance of the evidence. The statute did not require the Department to state its reasons for rejecting each finding separately.

6. Hospitals and Other Medical Facilities— certificate of need—findings—form of review—not de novo

A petitioner for a certificate of need (CON) for a mobile MRI was not entitled to relief based solely on the form of the Department of Health and Human Services findings. The statutorily authorized administrative review of a CON Section decision is intended to consist of an examination of the correctness of the decision rather than a *de novo* examination of the merits of the original application. Moreover, the Department clearly adopted the CON Section's findings as its own and was not simply reciting the determinations made by the CON Section in the challenged findings.

7. Hospitals and Other Medical Facilities— certificate of need—whole record test

The whole record test applied to review of a Department of Health and Human Services decision on a petition for a certificate of need for a mobile MRI scanner to the extent that petitioner's argument rested on a contention that the Department's findings lacked adequate evidentiary support or that it failed to make findings in accord with the undisputed evidence.

8. Hospitals and Other Medical Facilities— certificate of need—failure to credit petitioner's evidence—no error

The Department of Health and Human Services did not err by failing to credit and act upon the evidence that petitioner offered in a certificate of need proceeding in an attempt to establish a need for a proposed mobile MRI scanner.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

9. Hospitals and Other Medical Facilities— certificate of need—projection of need—methodology

The Department of Health and Human Services did not err by concluding that petitioner's certificate of need application did not conform with 10 N.C.A.C. 14C.2703(a)(2) and (3). The Department rejected petitioner's projection of the procedures that would be performed on the proposed scanner in the third year because petitioner did not adequately explain the methodology used to develop the projection.

10. Hospitals and Other Medical Facilities— certificate of need—need not shown

A careful examination of the record demonstrated that the Department of Health and Human Services had an adequate basis for its conclusion that a petitioner seeking a certificate of need had not made the requisite showing of need.

11. Hospitals and Other Medical Facilities— certificate of need—denial not arbitrary and capricious

The Department of Health and Human Services did not arbitrarily and capriciously deny an application for a certificate of need where a careful examination of the Department's decision revealed that it thoroughly considered and analyzed the record evidence, and adequately explained the reasons that caused it to conclude that petitioner had failed to satisfy all of the relevant criteria.

Appeal by petitioner from a Final Agency Decision entered 8 June 2009 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 29 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott Strod, for State.

Parker Poe Adams & Bernstein LLP, by Renee J. Montgomery, for petitioner-appellant.

Kirschbaum, Nanney, Keenan & Griffin, P.A., by Frank S. Kirschbaum & Chad Lorenz Halliday, for respondent-intervenor-appellee.

ERVIN, Judge.

Petitioner Eastern Carolina Internal Medicine, P.A., (ECIM) submitted an application for a Certificate of Need (CON) authorizing the

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

purchase and operation of a mobile Magnetic Resonance Imaging scanner pursuant to N.C. Gen. Stat. § 131E-182 on 15 November 2007. Respondent Certificate of Need Section of the North Carolina Department of Health and Human Services (the Department) denied ECIM's application on the basis of a determination that ECIM had failed to show compliance with the applicable statutory review criteria on 28 April 2008. On 8 June 2009, the Department issued a Final Agency Decision upholding the CON Section's decision. After careful consideration of ECIM's numerous challenges to the Department's decision in light of the record and the applicable law, we conclude that the Department's decision should be affirmed.

I. Factual Background

ECIM is a physician-owned medical practice with offices located in Cape Carteret, Havelock, New Bern, and Pollocksville. On 15 November 2007, ECIM applied for the issuance of a CON with the CON Section of the Department seeking permission to acquire and operate a mobile MRI scanner for the purpose of providing intermittent service at locations within MRI Service Area 23. According to the applicable statutory provisions governing the issuance of CONs, the CON Section must determine whether an application satisfies the review criteria enumerated in N.C. Gen. Stat. § 131E-183(a).

The State Medical Facilities Plan (SHCC) is a health care planning document that is developed annually by the Department and the State Health Coordinating Council, an advisory board comprised of physicians, hospital representatives, representatives of academic medical centers, members of the General Assembly, and other citizens appointed by the Governor. N.C. Gen. Stat. §§ 131E-176(17), 131E-176(25), and 131E-177(4). The Plan establishes the parameters applicable to the development of and need for regulated health services, equipment and facilities. In the event that the Plan provides that a certain service, facility, or piece of equipment is needed in a particular area, an individual or entity seeking to provide that service, facility, or piece of equipment is still required to seek and obtain a CON before providing that service or obtaining and operating that facility or piece of equipment. N.C. Gen. Stat. § 131E-178(a).

According to the Plan adopted for 2007, there was no need for additional service in MRI Service Area No. 23. However, the SHCC did plan to award a fixed MRI scanner in 2008 for the purpose of serving Craven, Jones, and Pamlico Counties. Even so, ECIM sought permission to purchase and operate a mobile MRI scanner, which it planned

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

to use at its main office in Pollocksville three days a week and at its New Bern office two days a week.¹ In its application, ECIM indicated that the proposed mobile MRI scanner would primarily serve Carteret, Craven, Jones, Onslow, and Pamlico Counties, which generally qualify as rural areas.

On 14 January 2008, a public hearing was held to discuss the need for the proposed mobile MRI scanner. ECIM's application was reviewed by Project Analyst Ron Loftin. Craig Smith, the Assistant Chief of the CON Section, reviewed, edited and signed the CON Section's findings. By means of a letter dated 28 April 2008, the CON Section denied ECIM's application on the grounds that it did not conform to the statutory criteria enunciated in N.C. Gen. Stat. § 131E-183(a). More specifically, the CON Section found that the ECIM application did not comply with Review Criteria Nos. 3, 4, 5, 6, 8, 13(c), and 18(a), and related rules.

On 28 May 2008, ECIM filed a Petition for Contested Case Hearing challenging the validity of the CON Section's decision with the Office of Administrative Hearings.

On 19 June 2008, Coastal Carolina Healthcare, P.A., which owns and operates a fixed MRI scanner located in New Bern, successfully intervened in the contested case. A contested case hearing was held before Administrative Law Judge Joe L. Webster from 10 December through 12 December 2008.

On 12 February 2009, ALJ Webster issued a Recommended Decision in which he proposed that the CON Section's decision to deny ECIM's application be upheld. After the issuance of the Recommended Decision, the parties were given an opportunity to submit written arguments, exceptions and proposed Final Agency Decisions to the Department. On 8 June 2009, the Acting Director of the Division of Health Service Regulation, Jeff Horton, issued a Final Agency Decision on behalf of the Department denying ECIM's application. In its conclusions of law, the Department noted, among other things, that:

10. The Agency properly determined that the ECIM application did not conform with Criterion 3, which requires that an "applicant . . . identify the population to be served by the proposed project, and . . . demonstrate the need that this population

1. In addition, ECIM applied for authorization to install and operate the fixed MRI scanner that would become available in 2008 as well.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services provided." N.C. Gen. Stat. § 131E-183(a)(c). ECIM failed to demonstrate the need the specific population it projects to serve has for the proposed mobile MRI scanner.

11. The Agency properly determined that the ECIM application did not conform with Criterion 13(c), because ECIM failed to demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority.

12. The Agency properly determined that the ECIM application did not conform with Criterion 13(c), because ECIM failed to show that the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services.

13. The Agency properly determined that the ECIM application did not conform with Criterion 13(c), because ECIM failed to demonstrate that medically underserved populations will have adequate access to the proposed services because it did not adequately demonstrate how or why the payor mix for Medicare patients would remain essentially the same as it currently is with the mobile MRI scanner and the payor mix for Medicaid patients would increase 1,300 percent.

14. The Agency properly determined that the ECIM application did not conform with Criterion 4, because it failed to demonstrate that the least costly or most effective alternative has been proposed.

15. The Agency properly determined that the ECIM application did not conform with Criterion 5, because ECIM failed to demonstrate that financial and operational projections for the project demonstrate the availability of funds for capital and oper-

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

ating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service. ECIM's projections of the number of MRI procedures to be performed in each of the first three operating years were unreasonably high, and its pro forma financial statements contained numerous other errors that made them inaccurate and unreliable projections.

16. The Agency properly determined that the ECIM application did not conform with Criterion 6, because ECIM failed to demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

17. The Agency properly determined that the ECIM application did not conform with Criterion 8, because ECIM failed to demonstrate that the provider of the proposed services will make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services and that the proposed service will be coordinated with the existing health care system.

18. The Agency properly determined that the ECIM application did not conform with Criterion 18(a), because ECIM failed to demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed.

19. The Agency properly determined that the ECIM application did not conform with Regulatory Criteria 10 N.C.A.C. 14C.2703(a)(2), because ECIM failed to demonstrate annual utilization in the third year of operation is reasonably projected to be at least 3328 weighted MRI procedures on the proposed mobile MRI scanner.

20. The Agency properly determined that the ECIM application did not conform with Regulatory Criteria 10 N.C.A.C. 14C.2703(a)(3), because ECIM failed to ["document the assumptions and provide data supporting the methodology used for each projection required in the rule." ECIM failed to provide adequate documentation to support each of its assumptions. ECIM did not state with sufficient clarity how it would achieve its goals set

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

forth in its application. *Retirement Villages, Inc. v. N.C. Department of Human Resources*, 124 N.C. App. 495 (1996).

21. The Agency properly determined that the ECIM application did not conform with Regulatory Criteria 10 N.C.A.C. 14C.2704(a), because ECIM failed to provide referral agreements between each host site and at least one other provider of MRI services in the geographic area to be served by the host site, to document the availability of MRI services if patients require them when the mobile unit is not in service at the host site.

ECIM noted an appeal from the Final Agency Decision to this Court.

II. Legal Analysis

A. Standard of Review

The procedures utilized in reviewing applications for the issuance of a CON are well-established. According to N.C. Gen. Stat. § 131E-182(b), a person seeking to obtain the issuance of a CON must make “application . . . on forms provided by the Department.” After compliance with the procedural requirements specified in N.C. Gen. Stat. § 131E-185 and utilizing the criteria outlined in N.C. Gen. Stat. § 131E-183(a), “the Department shall issue a decision to ‘approve,’ ‘approve with conditions,’ or ‘deny,’ an application for a new institutional health service.” N.C. Gen. Stat. § 131E-186(a). “Within five business days after it makes a decision on an application, the Department shall provide written notice of all the findings and conclusions upon which it based its decision, including the criteria used by the Department in making its decision, to the applicant.” N.C. Gen. Stat. § 131E-186(b).

“The review procedure set forth in [the CON] law allows for the agency to make an initial decision as to whether an applicant is entitled to a certificate of need.” *Britthaven, Inc. v. N. C. Dept. of Human Resources*, 118 N.C. App. 379, 381, 455 S.E.2d 455, 458, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995) (citing N.C. Gen. Stat. § 131E-186(a)). The agency’s decision to approve, approve with conditions, or deny an application for a CON must be based upon its determination as to whether the applicant has complied with the statutory review criteria set out in N.C. Gen. Stat. § 131E-183(a) and, in this case, the administrative regulations governing the administration of the CON program, 10A N.C.A.C. 14C.2703 *et seq.* An applicant for the issuance of a CON has the burden of demonstrating compliance with the review criteria enumerated in N.C. Gen. Stat. § 131E-183. *See Presbyterian-Orthopaedic Hosp. v. N.C. Dept. of Human*

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

Resources, 122 N.C. App. 529, 534, 470 S.E.2d 831, 834 (1996), *review improvidently granted*, 346 N.C. 267, 485 S.E.2d 294 (1997).

“After a decision by the Department to issue, deny or withdraw a certificate of need . . . , any affected person . . . shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 131E-188(a). A petition initiating a contested case convened for the purpose of challenging a decision by the CON Section

shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously;
- (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a). “Under Chapter 150B, a petitioner is afforded a full adjudicatory hearing before the ALJ, including an opportunity to present evidence and cross examine witnesses.” *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (citing N.C. Gen. Stat. § 150B-23(a) and N.C. Gen. Stat. §§ 150B-25(c) and (d)). After the hearing, “the [ALJ] shall make a recommended decision or order that contains findings of fact and conclusions of law.” N.C. Gen. Stat. § 150B-34(c). “Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that *the agency* substantially prejudiced petitioner’s rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily [or] capriciously, used improper procedures, or failed to act as required by law or rule.” *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (citing N.C. Gen. Stat. § 150B-23(a)). As a result, the purpose of the ALJ’s determination in a CON case is to review the correctness of the Department’s decision utilizing the standards enunciated in N.C. Gen. Stat. § 150B-23(a) rather than to engage in a *de novo* review of the evidentiary record. *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (rejecting a litigant’s contention that the initiation of a contested case proceeding before the Office of Administrative Hearings “commenced a *de novo* proceeding by the ALJ intended to lead to the for-

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

mulation of the final decision,” since the role of the ALJ under the applicable statutory provisions is “to determine whether the petitioner has met its burden” in showing that the agency decision substantially prejudiced the petitioner’s rights and is subject to reversal for one of the reasons listed in N.C. Gen. Stat. § 150B-23(a)).

After the issuance of the ALJ’s decision, “[a] final decision shall be made by the agency in writing after review of the official record as defined in [N.C. Gen. Stat. §] 150B-37(a) [which] shall include findings of fact and conclusions of law” and “recite and address all of the facts set forth in the recommended decision.” N.C. Gen. Stat. § 150B-34(c). “Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of a final decision of the Department” by means of an appeal to this Court pursuant to N.C. Gen. Stat. § 7A-29(a). N.C. Gen. Stat. § 131E-188(b).

“In reviewing a CON determination:

[m]odification or reversal of the agency decision is controlled by the grounds enumerated in [N.C. Gen. Stat. § 150B-51(b)]; the decision, findings, or conclusions must be:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary and capricious.”

Parkway Urology v. NCDHHS, — N.C. App. —, —, 696 S.E.2d 187, 192 (2010), *disc. review denied*, — N.C. —, 705 S.E.2d — (2010) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep’t of Health & Human Services*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005) (quoting N.C. Gen. Stat. § 150B-51(b) (1999)²); *see also Dialysis Care of N.C., LLC v. N.C. Dep’t of Health & Human Servs.*, 137 N.C. App.

2. The previous decisions of this Court have clearly established that the 1999 version of N.C. Gen. Stat. § 150B-51 controls our review of Department orders granting or denying CON applications. *Total Renal Care*, 171 N.C. App. at 738, 615 S.E.2d at 83-84.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

638, 645, 529 S.E.2d 257, 261, *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000).³

The standard of review of an administrative agency's final decision is dictated by the substantive nature of each assignment of error. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004) (detailing the standard of review for reversing or modifying an agency's decision under the six grounds specified by N.C.G.S. § 150B-51(b) and classifying those grounds into "law-based" or "fact-based" inquiries); *Total Renal Care of N.C., L.L.C. v. N.C. HHS*, 171 N.C. App. 734, 737-39, 615 S.E.2d 81, 83-84 (2005) (detailing the interplay of the CON statutes with the 1999 Administrative Procedures Act).

Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Serv., 189 N.C. App. 534, 543, 659 S.E.2d 456, 462, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008). If an appellant asserts that the Department's final decision rests upon an error of law, this Court conducts a *de novo* analysis. *Good Hope*, 189 N.C. App. at 543, 569 S.E.2d at 462. Fact-intensive issues, such as sufficiency of the evidence to support a particular finding of fact or allegations that a particular decision is arbitrary or capricious, are reviewed using the whole record test. *Dialysis Care*, 137 N.C. at 646, 529 S.E.2d at 261. "The 'whole record' test does not operate as a tool of judicial intrusion into the administrative decision-making process; instead, it gives a reviewing court the capability to determine whether an administrative decision is rationally based in the evidence." *Hospital Group of Western N.C., v. N.C. Dept. of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). Put another way, "[w]e should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*." *Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261. We now utilize this standard of review to analyze the validity of Petitioner's challenge to the Final Agency Decision.

3. In addition to the standard of review issues discussed in the text of this opinion, we are also required "to determine whether the [Department] relied on new evidence in making its decision." *Total Renal Care*, 171 N.C. App. at 738, 615 S.E.2d at 84 (citing N.C. Gen. Stat. § 150B-34(c)); N.C. Gen. Stat. § 150B-51(a); *Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs.*, 169 N.C. App. 641, 647, 611 S.E.2d 431, 435-36, *disc. review improvidently granted*, 360 N.C. 156, 622 S.E.2d 621 (2005). However, since ECIM has not alleged that the Department considered new evidence in reaching its final decision, we need not address that issue in any detail.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

B. Specific Challenges to the Final Agency Decision

1. Compliance with N.C. Gen. Stat. § 150B-23

[1] In its first challenge to the Department's decision, ECIM contends that the Department failed to properly apply the standards articulated in N.C. Gen. Stat. § 150B-23(a) in reviewing the CON Section's decision. More particularly, ECIM contends that, rather than considering all of the ways in which the CON Section failed to comply with the applicable statutes and regulations, the Department merely considered "[w]hether the [CON Section] acted within its authority or jurisdiction in disapproving the CON application of ECIM." According to ECIM, despite "substantial testimony and other evidence to support its claims that the CON Section's decision violated each of the standards of N.C. [Gen. Stat.] § 150B-23(a)," the Department failed to address the applicable standards altogether and, on the contrary, merely addressed the issue of whether the CON Section's decision was "arbitrary or capricious." Moreover, ECIM argues that the Department compounded this error by affording a presumption of correctness to the CON Section's decision. We do not find ECIM's argument persuasive.

According to N.C. Gen. Stat. § 150B-23(a), ECIM was required, in order to successfully challenge the CON Section's decision, to demonstrate that the CON Section's decision "substantially prejudiced" its rights and that the CON Section "[e]xceeded its authority or jurisdiction," "[a]cted erroneously," "[f]ailed to use proper procedure," "[a]cted arbitrarily or capriciously," or "[f]ailed to act as required by law or rule." According to the allegations of ECIM's petition, the CON Section's decision was subject to reversal for each of the reasons specified in N.C. Gen. Stat. § 150B-23(a).

More particularly, ECIM alleged in its petition that the CON Section erred in denying its application for the following reasons:

8. In making its decision to deny ECIM's application[,] the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule. The CON Section has substantially prejudiced ECIM's rights by not approving ECIM's CON application. Based upon its knowledge at the present time, the facts supporting ECIM's contentions are set forth below. Because ECIM has not yet had the opportunity to conduct discovery in this matter with regard to the review at

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

issue, it expressly reserves the right to rely upon additional facts and theories.

9. The CON Section erred in failing to properly consider many important facts about the proposal of ECIM. ECIM reserves the right to allege additional errors as they become known through discovery. The CON Section's decision states arbitrary and unsubstantiated reasons for denying ECIM's application. The CON Section failed to conduct a proper and fair analysis of ECIM's application and violated the standards of N.C. [Gen. Stat.] § 150B-23 in at least the following respects:

a. The Agency incorrectly determined that ECIM's application did not conform to statutory review criterion set forth in N.C. [Gen. Stat.] § 131E-183(a)(3). The CON Section failed to properly consider ECIM's extensive community and physician support. The CON Section also failed to consider the increased MRI services to Medicaid beneficiaries that would result from ECIM's ownership of a mobile MRI.

b. The CON Section erroneously determined that ECIM's application did not conform with N.C. [Gen. Stat.] § 131E-183(a)(4). The CON Section incorrectly based its conclusion concerning Criterion 4 on arbitrary and erroneous analysis and information involving Criteria 3, 5, 6, 7, and 10A N.C.A.C. 14C .2700.

c. The CON Section erroneously determined that ECIM's application did not conform with N.C. [Gen. Stat.] § 131E-83(a)(5). The CON Section failed to consider all relevant information concerning ECIM's current and future financial situation and the substantial community and physician support for the project. The CON Section arbitrarily and erroneously determined that ECIM's projections of the number of MRI procedures to be performed in each of the first three operating years were unreasonably high, even though its projections are consistent with its current mobile experience.

d. The Agency erroneously determined that ECIM's application did not conform with N.C. [Gen. Stat.] § 131E-183(a)(6) because of Criterion 3. ECIM's application fully conforms with Criterion 3.

e. The CON Section erroneously determined that ECIM's application did not conform with N.C. [Gen. Stat.] § 131E-183(a)(8). Several of the physicians at ECIM currently have privileges at

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

Craven Regional Medical Center and therefore the ability to make referrals will be unchanged. In addition, ECIM has a transfer agreement with Craven Regional Medical Center, a provider of MRI services, which was known to the CON Section. Furthermore, to the extent that Criterion 8 requires an applicant to provide referral agreements with a competitor before a CON is issued, ECIM contends such a requirement is arbitrary and unreasonable.

f. The Agency erroneously determined that ECIM's application did not conform with N.C. [Gen. Stat.] § 131E-183(a)(13)(c). However, ECIM's application adequately shows that elderly and other medically underserved groups will be served by the proposed mobile MRI. The CON Section states arbitrary and unsupported reasons for determining that ECIM did not meet the requirements of this criterion.

g. The CON Section erroneously determined that ECIM's application did not conform with N.C. [Gen. Stat.] § 131E-183(a)(18a). The CON Section based its conclusion on incorrect and arbitrary analyses and assumptions concerning Criteria 3, 5, and 6.

h. The CON Section erroneously determined that ECIM's application failed to conform or conditionally conform with all the special criteria of IOA N.C.A.C. 14C.2700, *et seq.* As set forth above, ECIM's application adequately demonstrated need and the availability of a referral arrangement with another provider of MRI services in its proposed service area.

ECIM's argument, as we understand it, suggests that, rather than determining the validity of each of its specific challenges to the CON Section's decision on the basis of the criteria set out in N.C. Gen. Stat. § 150B-23(a), the Department should have systematically asked itself first, whether the CON Section's decision "[e]xceeded its authority or jurisdiction" and then moved through each of the other grounds for reversal set out in N.C. Gen. Stat. § 150B-23(a). We do not believe that the applicable statutory provisions contemplate the use of such a process. Instead, the literal language of N.C. Gen. Stat. § 150B-23(a), which requires a petitioner such as ECIM to "state facts tending to establish" that the agency acted unlawfully for one or more of the specific reasons set out in that subsection, contemplates a process under which ECIM was required to allege that the CON Section's decision was unlawful in one or more specific ways, with those allegations serving to focus subsequent review by the ALJ and the Department. Thus, we do not believe that the approach implicit in

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

ECIM's first argument is consistent with the applicable statutory provisions.

[2] Similarly, ECIM's complaint that the Department impermissibly awarded a presumption of validity to the CON Section's decision cannot be squared with applicable provisions of North Carolina law. According to N.C. Gen. Stat. § 150B-29(a), ECIM was required to establish that the CON Section's decision was subject to reversal under one or more of the standards enumerated in N.C. Gen. Stat. § 150B-23(a) in order to mount a successful challenge to the CON Section's decision. *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d 460. As the Department correctly noted, in light of the fact that ECIM bore the burden of proving error in the CON Section's decision, there is a presumption that "an administrative agency has properly performed its official duties." *In re Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980). Thus, the Department did not err by presuming that the CON Section acted in accordance with applicable law.

[3] Finally, we are unable to accept ECIM's argument that the Department erred by reviewing the CON Section's decision utilizing an "arbitrary and capricious" standard instead of considering all of the grounds for error outlined in N.C. Gen. Stat. § 150B-23(a). There are two fundamental problems with ECIM's argument to this effect. First, many of the errors alleged in ECIM's petition rest upon a contention that the CON Section acted in an arbitrary and capricious manner. For example, Paragraph Nos. 9 (b), (c), (d), (e), (f), and (g) specifically assert that the CON Section acted arbitrarily. Thus, to the extent that ECIM alleged that the CON Section acted arbitrarily and capriciously, the Department did not err by utilizing that standard of review. Secondly, although the Department's conclusion to the effect that the presumption that the CON Section acted properly could be "rebutted *only* by a showing that the Agency was arbitrary or capricious in its decision making" is erroneous to the extent that it suggests that the "arbitrary and capricious" standard was the only one with a potential applicability to this proceeding, we do not believe that the language upon which ECIM relies indicates that the Department confined itself to the use of the "arbitrary and capricious" standard of review. Immediately after the series of legal conclusions upon which this aspect of ECIM's argument rests, the Department stated that "North Carolina law . . . gives great deference to an agency's interpretation of a law it administers." Based upon the presence of this language in the Department's decision, it is clear that the Department recognized that "law-based" challenges to a decision

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

made by the CON Section were not subject to review under an “arbitrary and capricious standard.” Moreover, a careful analysis of the remainder of the Department’s decision indicates that it addressed each issue raised by ECIM utilizing the correct standard, and ECIM has not shown otherwise. As a result, ECIM is not entitled to relief based upon its challenges to the manner in which any standards under which the Department reviewed the CON Section’s decision.

2. Necessity for Compliance With All CON Criteria

[4] Secondly, ECIM challenges the Department’s determination that a successful CON application must comply with all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). In arguing that the Department’s conclusion of law to this effect is directly contradicted by N.C. Gen. Stat. § 131E-186(a) (stating that “the Department shall issue a decision to ‘approve,’ ‘approve with conditions,’ or ‘deny,’ an application . . .”), ECIM relies on our decision in *Dialysis Care*, 137 N.C. App. at 650, 529 S.E.2d at 264. Once again, we conclude that ECIM’s argument lacks merit.

N.C. Gen. Stat. § 131E-183(a) provides that the Department “shall determine that an application is either consistent with or not in conflict with [the] criteria [listed in the statute] before a [CON] for the proposed project shall be issued.” In *Dialysis Care*, Bio-Medical Applications of North Carolina, Inc. (BMA), and others sought the issuance of a CON authorizing the establishment of a kidney dialysis facility in Kannapolis. *Id.* The CON Section conditionally approved the application because of its non-compliance with N.C. Gen. Stat. § 131E-183(a)(5), which requires a showing that adequate funds are available for the capital and operating needs of the proposed facility. *Id.* at 643, 529 S.E.2d at 260. Although BMA submitted a letter confirming the existence of a financial commitment for a portion of the project, the CON Section conditioned approval of the requested CON upon its ability to document that it had the ability to pay the remaining costs. *Id.* at 646, 529 S.E.2d at 262. The purpose of the condition imposed upon BMA was to confirm its ability to satisfy one the required statutory criteria. In other words, the CON Section decided to conditionally approve BMA’s application based upon its determination that, once the relevant documentation had been provided, BMA had demonstrated its compliance with the criteria set forth in N.C. Gen. Stat. § 131E-183. *Id.* Thus, the effect of the decision to conditionally approve BMA’s application was to allow BMA, after having shown a need for the proposed facility, to come into compliance with

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

all of the required statutory criteria. In the present case, however, both the CON Section and the Department found the existence of numerous deficiencies in ECIM's application, including a failure to demonstrate a need for the proposed scanner. The record contains no indication that the Department acted unreasonably by simply denying ECIM's application rather than approving it subject to some sort of unspecified condition. As a result, given the absence of any indication that the challenged language had any adverse impact on ECIM, we find no error in the Department's conclusion that "a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a)" and that, "[i]f an application fails to conform with any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law."

3. Failure to State Specific Reasons for Rejecting ALJ Findings

[5] Thirdly, ECIM contends that the Department erred by failing to set forth specific reasons explaining its decision to refrain from adopting certain findings of fact made by ALJ Webster. N.C. Gen. Stat. § 150B-34(c) provides, in pertinent part, that:

A final decision shall be made by the agency in writing after review of the official record as defined in [N.C. Gen. Stat.] § 150B-37(a) and shall include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under [N.C. Gen. Stat.] §§ 150B-29(a), 150B-30, or 150B-31.

The Department's decision included a section entitled "Reasons for Modifying the ALJ's Decision," in which the Department stated that:

1. I adopt the following Findings of Fact contained in the Recommended Decision in whole: 1-11, 22, 24, 31-32, 35, 37-38, 40, 42, 44, 46-49. I expressly reject the remaining Findings of Fact because they are unsupported by the clear preponderance of the evidence in this case. The above-listed adopted Findings of Fact are restated and renumbered as set forth in this Final Agency Decision.

2. I reject Conclusions of Law 16 on the grounds that it is not supported by law or evidence.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

3. I add the additional Findings of Fact and Conclusions of Law contained herein because they further evidence the ECIM Application's failure to conform with applicable statutory and regulatory review criteria.

In arguing that the Department's decision does not comply with N.C. Gen. Stat. § 150B-34(c), ECIM cites *Mission Hosps., Inc. v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 268, 275-76, 658 S.E.2d 277, 284 (2008), for the proposition that N.C. Gen. Stat. § 150-34(c) requires the Department to make a specific statement relating to each rejected finding of fact and that any failure on the part of the Department to do so deprives ECIM of the right to "meaningful appellate review." We do not find this argument persuasive.

In the decision at issue in *Mission Hospitals*, the Department failed to state any reasons for declining to adopt certain of the ALJ's findings of fact. *Id.* at 275, 658 S.E.2d at 284. Moreover, the Department declined to adopt certain findings and conclusions which it deemed "immaterial" or "irrelevant" to the substantive issues it believed that it was required to consider. *Id.* The *Mission Hospitals* Court noted that the relevant statutory language did not provide that the statement of the specific reasons that led the agency to refrain from adopting the findings and conclusions in question had to be supported by substantial evidence; instead, we noted that the statutory language simply required the Department to state its reasons for not adopting the findings in question.

In its decision in this case, the Department clearly indicated which of ALJ Webster's findings it adopted and which it declined to adopt before stating that the rejected findings were "unsupported by the clear preponderance of the evidence in this case." Contrary to the argument advanced in ECIM's brief, N.C. Gen. Stat. § 150B-34(c) does not require the Department to state its reasons for rejecting each ALJ finding separately. The adoption of such a requirement would elevate form over substance. The obvious purpose of the specific provision of N.C. Gen. Stat. § 150B-34(c) at issue here is to ensure that a reviewing court and all interested parties understand the Department's reasons for rejecting particular findings of fact made by the ALJ. This purpose can be achieved without the adoption of a "finding by finding" requirement of the type for which ECIM appears to contend. As a result of the fact that the Department specifically stated its reason for not adopting certain of the ALJ's findings and since its statement sufficiently apprises both this Court and the parties of the reasons for the Department's decision, we conclude that the Department sufficiently

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

complied with N.C. Gen. Stat. § 150B-34(c) and that ECIM's argument to the contrary lacks merit. *See Total Renal Care*, 171 N.C. App. at 736, 615 S.E.2d at 82 (holding that the Department's statement that its own findings "more accurately reflect the evidence in the record and a proper implementation of the [CON] Law" constituted an adequate statement of its reasons for declining to adopt the ALJ's findings of fact).

4. Sufficiency of the Department's Findings

[6] Fourthly, ECIM challenges the sufficiency of the Department's findings concerning the extent to which its application failed to satisfy the statutory criteria for the issuance of a CON set out in N.C. Gen. Stat. § 131E-183(a). In essence, ECIM argues that, since many of the Department's findings are couched in terms of what the CON Section "found," it failed to independently find the facts necessary to determine whether the requested CON should have been issued. We do not believe that, given the facts of this case, ECIM is entitled to relief on the basis of this argument.

As we have already indicated, the statutorily authorized administrative review of a CON Section decision is intended to consist of an examination of the correctness of the CON Section's decision rather than a *de novo* examination of the merits of the original application. *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d 459. For that reason, the ultimate issue before the ALJ and the Department was whether the CON Section correctly concluded that ECIM failed to satisfy the approval criteria set out in N.C. Gen. Stat. § 131E-183(a). The challenged findings, which clearly focus on what the CON Section found, are consistent with this understanding of the purpose of administrative review of a CON Section decision. Having provided ECIM with an opportunity to challenge the validity of the CON Section's findings, upholding the CON Section's decision coupled with a recitation of a finding made by the CON Section necessarily amounts to a determination that ECIM's challenge to that decision lacked merit. As a result, given the nature of the administrative review process at issue here, we do not believe that the form of the challenged findings of fact provides a sufficient basis for overturning the Department's decision.

In addition, a careful reading of the Department's decision makes it completely clear that the Department was not simply reciting the determinations made by the CON Section in the challenged findings of fact. Instead, the Department clearly adopted the CON Section's determinations as its own. For example, ALJ Webster made Finding of Fact No. 12 in his Recommended Decision:

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

12. The Agency found the ECIM application nonconforming with Criterion 3 based upon the fact that ECIM does not state specifically that it needs additional capacity and or that it has been denied additional days of service by the provider of its current mobile scanner beyond that available. (Agency File, Pet. Exhibit 2, p. 102). The undersigned finds as a fact and as a matter of law that Criterion 3 does not require ECIM to prove either of these findings and is insufficient for the Agency to find that ECIM's application did not conform to Criterion 3.

In its decision, on the other hand, the Department found that:

12. Respondent found the ECIM application does not state specifically that it needs additional capacity and or that it has been denied additional days of service by the provider of its current mobile scanner beyond that available. (Agency File, Pet. Exhibit 2, p. 102).

In that portion of its decision discussing the reasons for rejecting certain of ALJ Webster's findings, the Department stated that it rejected these findings "because they are unsupported by the clear preponderance of the evidence in this case" and indicated that the "adopted Findings of Fact are restated and renumbered as set forth in this Final Agency Decision." As this language makes clear, the effect of the Department's rewrite of the ALJ's findings was to include in its final decision only that factual material that it believed had adequate record support.⁴ Our conclusion to this effect is bolstered by our determination that the record does not appear to indicate that the factual statements made by the CON Section in the challenged findings are in serious dispute. Instead, as we understand the record, the real issue arising from these findings is the legal significance to be afforded to the factual determinations that they contain, which is a separate and distinct question from their factual accuracy. Thus, in light of the purpose of the requirement that the Department make findings of fact and conclusions of law in its final decision and the language in which the Department's final decision is couched, we conclude that ECIM is not entitled to obtain relief from the Department's decision based solely on the form of the challenged findings of fact.⁵

4. In spite of our conclusion that the form of the challenged findings does not require us to overturn the Department's decision, we do agree with ECIM that it would be preferable for the Department to couch its findings in future decisions as the Department's own determinations rather than as a recitation of what the CON Section found.

5. In a related challenge to the Department's determination, ECIM argues that the Department did not utilize the statutorily-required preponderance of the evidence standard in making its factual determinations and that we should effectively conduct

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

5. Sufficiency of the Department's Need Finding

[7] Next, ECIM challenges the adequacy of the Department's conclusion that ECIM's application did not satisfy the statutory criterion enunciated in N.C. Gen. Stat. § 131E-183(a)(3). Although the full scope of ECIM's challenge to the Department's determination with respect to Criterion No. 3 is not entirely clear, we interpret ECIM's brief to contend that the Department failed to adequately address certain challenges that ECIM advanced to the CON Section's determination⁶ and that ECIM adequately demonstrated a need for the proposed mobile MRI scanner based on physician referral estimates, demographic data, patient surveys, community support, the current level at which its physicians utilized the Alliance MRI scanner⁷, and the fact that its physicians faced a two-week wait time to obtain MRI scans for patients. Reduced to its essentials, ECIM's argument amounts to a contention that the Department made certain findings that lacked adequate evidentiary support and that the Department did not give proper weight to the testimony upon which it relied in

a *de novo* examination of the record. However, it is clear from the reasons that the Department gave for rejecting certain of ALJ Webster's findings that it correctly utilized a preponderance of the evidence standard in making its final decision.

6. According to ECIM, the Department failed to address its argument that ECIM was not required to establish that ECIM needed additional MRI capacity or that it had been denied additional days of service by its contract provider, that it was not required to provide the number of Medicare and Medicaid patients that it had referred to other MRI scanners, that it was not required to serve a certain percentage of Medicare or Medicaid patients in order to receive the requested CON, and that other criticisms of the CON Section's decision advanced by ALJ Webster had merit. At bottom, we believe that this aspect of ECIM's argument rests on a desire for more detailed findings of fact than were provided in the Department's final decision. Although an administrative agency is certainly required to include sufficient findings of fact to permit a reviewing court to determine whether the agency's decision was supported by sufficient evidence and whether the agency properly applied the applicable law, the agency is not required to minutely analyze every factual dispute that arises on the evidentiary record at the risk of having its decision overturned. *Smith v. Beasley Enters., Inc.*, 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002) (stating that an administrative agency is not required to make "exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence") (quoting *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998)). Thus, the Department's failure to address each and every argument that ECIM utilized in its attempt to overturn the CON Section's decision simply does not constitute an error of law as long as we are able to carry out the fundamental responsibilities imposed upon a reviewing court. As a result of our determination that the Department's findings and conclusions are sufficient to permit adequate appellate review, its failure to make findings of fact addressing the issues listed in ECIM's brief does not justify a decision to grant appellate relief in this case.

7. The Alliance scanner provided service to ECIM patients on a contract basis.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

attempting to demonstrate the existence of the requisite need for the proposed mobile MRI scanner. As a result, to the extent that ECIM's argument rests on a contention that the Department's findings lack adequate evidentiary support or that it failed to make findings in accordance with the undisputed record evidence, it is really arguing that the Department's decision was not supported by the evidence or was arbitrary or capricious, thus triggering application of the "whole record test." *Dialysis Care*, 137 N.C. App. at 646, 529 S.E.2d at 261. In applying this test, we must examine the entire record in order to determine whether the Agency's decision is supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 52, 625 S.E.2d 837, 841 (2006) (quoting *Blalock v. N.C. Dep't of Health & Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 180 (2001)).

In concluding that ECIM's application did not satisfy Criterion No. 3, the Department made the following findings of fact:

11. Criterion 3 requires that an "applicant . . . identify the population to be served by the proposed project, and . . . demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a).

12. Respondent found the ECIM application does not state specifically that it needs additional capacity and or that it has been denied additional days of service by the provider of its current mobile scanner beyond that available. (Agency File, Pet. Exhibit 2, p. 102.)

13. Respondent found the ECIM application states that its Medicare and Medicaid patients cannot be served on ECIM's service contracted mobile MRI scanner because of Stark restrictions, while in another section of the application ECIM reports that 35 percent of the procedures it performed on the mobile MRI service scanner were Medicare patients and ECIM proposes serving a comparable percentage on its proposed mobile MRI scanner. (Agency File, Pet. Exhibit 2, p. 102.)

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

14. Respondent found the ECIM application does not demonstrate how or why Medicaid and Medicare will increase nearly three times ECIM's current amount. (Agency File, Pet. Exhibit 2, p. 102.)

15. Respondent found that ECIM does not currently provide mobile MRI scanner services at its New Bern office and does not provide sufficient documentation that it, as a new MRI provider in Craven County, could achieve 13 percent of the Craven County market in its first year. (Agency File, Pet. Exhibit 2, p. 106.)

16. Respondent found that ECIM provided insufficient utilization of mobile MRI services in 2007 upon which to base its projected ability to capture a 13 percent share of the Craven County MRI market. (Agency File, Pet. Exhibit 2, p. 106.)

17. Respondent found that ECIM does not document how it could achieve a 13 percent market share in Craven County, a 12.7 percent share in Pamlico County, and a 10.8 percent market share in Carteret County in light of the upcoming development of two additional fixed MRI scanners. (Agency File, Pet. Exhibit 2, p. 106.)

18. Respondent found that ECIM does not demonstrate the reasonableness of the assumption of its proposal to increase the number of days of service per year to 250 and increase the number of MRI procedures to be performed to 3,000 in 2009 because it does not provide data as to the need for service by county and did not provide the number of Medicare/Medicaid patients that ECIM physicians had referred to other MRI scanners in the service area. (Agency File, Pet. Exhibit 2, p. 106.)

19. Respondent found that ECIM does not provide letters from physicians in the proposed service area specifying where they will refer patients in order to support the "nearly 700 annually" referrals it estimates in referrals from these physicians. (Agency File, Pet. Exhibit 2, p. 107.)

20. Respondent found that ECIM does not provide an endorsement letter from the ECIM physicians providing information about which of the six ECIM offices the individual physician works in or to which of the two proposed MRI sites their patients would be referred in order to support the more than 3,000 patients the practice estimates it would refer to the proposed scanner annually. (Agency File, Pet. Exhibit 2, p. 107.)

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

21. Respondent found that ECIM does not provide data as to the number of potential patients who are not living “close-in to New Bern” or an estimate of the number of patients that ECIM New Bern physicians are currently having to send elsewhere for MRI scans. (Agency File, Pet. Exhibit 2, p. 107.)

22. Based upon its findings in Paragraphs 11-21 above, Respondent found the ECIM Application nonconforming with Criterion 3.

23. Patients of ECIM physicians wait two weeks to receive MRI studies at ECIM MRI facilities. (Hearing Tr. Vol. 2, 333, December 11, 2008.) ECIM has not attempted to determine whether this waiting period could be avoided by making use of other MRI services available in the service area. (Hearing Tr. Vol. 1, 39-40, 75, December 10, 2008; Hearing Tr. Vol. 2, 333, December 11, 2008; Exhibit 1, p. 43, 144; Gilgo Dep. 36:9-16, December 2, 2008.)

Based upon these findings of fact, the Department concluded that ECIM had not satisfied Criterion 3 because it “failed to demonstrate the need the specific population it projects to serve has for the proposed mobile MRI scanner.”

a. Failure to Credit ECIM’s Need Showing

[8] In challenging the Department’s conclusion concerning Criterion No. 3, ECIM argues that the Department did not properly consider the evidence offered in support of its need showing. We disagree.

According to ECIM, the need for the mobile MRI service was demonstrated, in part, by physician letters that included projections that the proposed service would generate 3,821 referrals by the end of the first year of operation. The referral projections, according to ECIM, exceeded the number of projected procedures required under the mobile MRI performance standards detailed in 10A N.C.A.C. 14C.2703(a)(2). According to ECIM, such physician referral letters constitute the “gold standard” that should be utilized in making determinations of need and should have been given great weight in the Department’s decision-making process. On the other hand, the Department determined that the letters in question did not identify the location of the authoring physicians or identify the MRI sites to which these referrals would be made. In other words, the Department concluded that the referral evidence was not relevant to the issue before it, which was the actual use that would be made of the proposed mobile MRI scanner. As a result, this aspect of ECIM’s argu-

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

ment amounts to a contention that the Department should have made a different credibility judgment than the one it actually made. This contention does not support an award of appellate relief given that the Department had a rational basis for rejecting this aspect of ECIM's argument.

Secondly, ECIM argues that the demographic information that it presented, which focused on population growth and growth in the number of MRI scans, including the extent to which the population in the relevant service area consisted of individuals who were 65 years old and older, demonstrated the need for the proposed mobile MRI scanner. However, such evidence is only relevant to the extent that sufficient scanning capability does not otherwise exist. No such showing appears to have been made here, particularly given the likelihood that a new fixed MRI scanner would begin to serve the relevant area in the near future. As a matter of basic logic, the showing needed to satisfy Criterion No. 3 for purposes of this proceeding requires a consideration of both the demand for the service in question in the relevant area and the extent to which that demand could be satisfied without the proposed mobile MRI scanner. Since the record supports a determination that the evidence upon which ECIM relies in support of this aspect of its argument is inherently incomplete, the Department did not deviate from its responsibility to decide the issues raised by ECIM's application on the basis of the record evidence by failing to find the necessary need based on general demographic data of the sort upon which ECIM relies.

Thirdly, ECIM argues that the Department did not properly consider expressions of community support received at the public hearing and the information received by means of patient surveys. ECIM contends that its current service with Alliance is fully utilized and that patients have expressed frustration at waiting two to three weeks for service. This aspect of ECIM's argument rests upon the desires of the community rather than an evaluation of the needs of the service area. This Court held in *Good Hope*, 189 N.C. App. at 563, 659 S.E.2d at 473, that an administrative agency's obligation to hear the public's arguments, "whether in favor of or opposed to an application," does not require the Department to find that an applicant has satisfied the need criterion in the event that there is public support for the proposed service. Instead, the agency must base its decision upon an analysis of all of the relevant evidence tending to show whether the requirements of a particular statutory criterion have been met. *Id.* Moreover, the wait times experienced by ECIM patients, while certainly relevant to the

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

need determination, constitute only a portion of the larger picture, which consists of the needs of all potential patients in the service area rather than a subset of that group. As a result, ECIM's showing of community support and patient dissatisfaction is not, either considered in isolation or as part of its overall evidentiary presentation, sufficient to compel a finding of need.

Finally, ECIM notes that its current service with Alliance is fully utilized and that the addition of two days of service added in October 2007 did not affect the existing average two-week wait period. Once again, however, this evidence does not compel a finding that ECIM's proposed mobile MRI scanner is needed. Although this evidence certainly provides an indication that ECIM patients are experiencing a two week wait time in spite of the expansion of the service available to ECIM from Alliance, it does not demonstrate whether the need can be met by other scanners in the service territory, including the new fixed scanner planned for 2008. Thus, once again, we are unable to conclude that the Department erred by failing to make a finding of need based on evidence relating to the wait times experienced by ECIM's patients at affiliated facilities. As a result, we cannot conclude that the Department erred by failing to credit and act upon the evidence that ECIM offered in an attempt to establish a need for the proposed mobile MRI scanner.

b. Compliance With 10 N.C.A.C. 14C.2703(a)(2) and (3)

[9] Elsewhere in its brief, ECIM argues that the Department erred by concluding that its application failed to conform with 10 N.C.A.C. 14C.2703(a)(2) and (3), which specify certain factors that must be considered in conjunction with the need criterion. According to 10 N.C.A.C. 14C.2703(a), an applicant must:

(2) demonstrate [that] annual utilization in the third year of operation is reasonably projected to be at least 3328 weighted MRI procedures on each of the existing, approved and proposed mobile MRI scanners owned by the applicant or a related entity to be operated in the mobile MRI region in which the proposed equipment will be located [Note: This is not the average number of weighted MRI procedures performed on all of the applicant's mobile MRI scanners.]; and

(3) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

According to ECIM, the Department erroneously failed to make any findings in support of its decision to reject ECIM's projection that 3,488 weighted MRI procedures would be performed on the proposed mobile MRI scanner in the third year.

In its Final Agency Decision, the Department rejected ECIM's estimates because ECIM had not adequately explained the methodology used to develop this projection. In making this determination, the Department found that:

43. Respondent found that ECIM failed to adequately demonstrate the mobile MRI scanner will perform 3,328 weighted MRI procedures in its third operating year. (Agency File, Exhibit 2, p. 122.) 10[] N.C.A.C. 14C.2703(a)(2). The undersigned finds as a fact and as a matter of law that ECIM did not prove by a preponderance of the evidence that the mobile scanner would perform 3,328 weighted MRI procedures in its third operating year.

....

45. Respondent found that ECIM failed to provide adequate documentation to support each of its assumptions. 10[] N.C.A.C.14C.2703(a)(3).

Based on these findings, the Department concluded as a matter of law that "[t]he Agency properly determined that the ECIM application did not conform with Regulatory Criteria 10 N.C.A.C 14C.2703(a)(2), because ECIM failed to demonstrate annual utilization in the third year of operation is reasonably projected to be at least 3328 weighted MRI procedures on the proposed MRI scanner" and that "[t]he Agency properly determined that the ECIM application did not conform with Regulatory Criteria 10 N.C.A.C. 14C.2703(a)(3)" because ECIM "failed to provide adequate documentation to support each of its assumptions" and "did not state with sufficient clarity how it would achieve its goals set forth in its application." Although ECIM argues on appeal that the Department failed to adequately explain the reason that it concluded that ECIM had not met the applicable burden of proof, it acknowledges that, at the hearing, the CON Section "discounted [the physician referral letters upon which ECIM relied to support its estimate of the number of MRI scans to be performed in the third year] by applying 'criteria' that are not requirements under the CON regulations." The fact that ECIM appears to dispute the validity of the approach adopted by the Department in discounting the number of projected MRI scans that would be performed using

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

the proposed mobile MRI scanner in the third year does not, without more, establish that this discounting procedure lacked adequate evidentiary support or was arbitrary and capricious. Thus, we are not persuaded by ECIM's challenge to the need-related determinations that the Department made pursuant to 10 N.C.A.C. 14C.2703(a)(2) and (3).

c. Adequacy of the Department's Findings

[10] Although most of ECIM's challenge to the Department's need determination rests on its contention that the Department failed to adequately consider evidence that ECIM offered in support of its position, ECIM also challenges the extent to which one of the Department's findings had adequate record support and appears to argue that the Department's findings do not support its conclusion that ECIM failed to satisfy Criterion No. 3. Once again, we do not find ECIM's argument persuasive.

In its brief, ECIM challenges the Department's finding that "[p]atients of ECIM's physicians wait two weeks to receive MRI studies at ECIM-MRI facilities" and that "ECIM has not attempted to determine whether this waiting period could be avoided by making use of other MRI services available in the service area" on the grounds that this finding lacks adequate evidentiary support. However, upon closer examination, it appears that ECIM's argument amounts to an assertion that the Department should have treated the first component of this finding as a reason for approving the proposed mobile MRI scanner rather than as a reason for rejecting it and that the evidence tending to show that Coastal Carolina had a two week waiting period at its scanner and that there were long drives and wait times associated with utilizing other area MRI scanners undercut the validity of the second aspect of this finding. However, the fact that ECIM does not challenge the factual accuracy of the first component of this finding, coupled with the anecdotal nature of the countervailing evidence upon which ECIM relies in challenging the second component does not deprive this finding of adequate record support, especially given the existence of other evidence tending to show that ECIM had not adequately explored its ability to reduce the wait times experienced by its patients using equipment owned and operated by other providers.⁸ Thus, ECIM's challenge to this particular finding of fact lacks merit.

8. For example, both ECIM's Chief Operating Officer, Craig Holton, and an ECIM physician, Dr. Robert Monteiro, testified that they were not aware of the wait times for other MRI scanners in the service area.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

A careful examination of the Department's findings of fact relating to Criterion No. 3, which we quoted earlier in this opinion, demonstrates that the Department had an adequate basis for its conclusion that ECIM had not made the requisite showing of need. Among other things, the Department found that ECIM had not "state[d] specifically that it needs additional capacity [or] that it has been denied additional days of service by" Alliance; that it had not provided an adequate showing in support of its contention that, "as a new MRI provider in Craven County, [it] could achieve 13 percent of the Craven County market;" that it had failed to demonstrate "how it could achieve a 13 percent market share in Craven County, a 12.7 percent share in Pamlico County, and a 10.8 percent market share in Carteret County in light of the upcoming development of two additional fixed MRI scanners;" that it had failed to "provide data as to the need for service by county and did not provide the number of Medicare/Medicaid patients that ECIM physicians referred to other MRI scanners in the service area;" that it had not provided "letters from physicians in the proposed service area specifying where they will refer patients in order to support the 'nearly 700 annually' referrals it estimates in referrals from these physicians;" that it did "not provide data as to the number of potential patients who are not living 'close-in to New Bern' or an estimate of the number of patients that ECIM New Bern physicians are currently having to send elsewhere for MRI scans;" and that it "has not attempted to determine whether [the two week] waiting period [described in ECIM's application] could be avoided by making use of other MRI services." A careful examination of these findings indicates that they provide ample justification for the Department's determination that ECIM had failed to satisfy the need criterion. As a result, in light of our examination of the entire record utilizing the "whole record" test, we conclude that the record contains substantial evidence supporting the Department's findings of fact and that the findings support the Department's ultimate conclusion that ECIM's application did not satisfy the need criterion.

6. Other Criteria

As a result of our decision to uphold the Department's determination that ECIM failed to satisfy the need criterion, ECIM's application was clearly subject to denial for failing to satisfy all of the applicable review criteria. *See Good Hope*, 189 N.C. App. 534, 659 S.E.2d 456. Thus, we need not address ECIM's remaining challenges to the Department's Final Agency Decision and refrain from doing so.

E. CAROLINA INTERNAL MED., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[211 N.C. App. 397 (2011)]

7. Arbitrary and Capricious

[11] Finally, ECIM contends that the Department's Final Agency Decision to deny its application was arbitrary and capricious. In seeking to persuade us of the merits of this argument, ECIM asserts that the Department failed to adequately examine the evidence or address the ALJ's findings. We do not find ECIM's argument persuasive.

The "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate any course of reasoning and the exercise of judgment[.]"

Act-Up Triangle v. Commission for Health Services, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (citation omitted). A careful examination of the Department's decision reveals that it thoroughly considered and analyzed the record evidence. The Department adequately explained the reasons that caused it to conclude that ECIM had failed to satisfy all of the criteria relevant to its application. *Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460; *Total Renal Care*, 171 N.C. App. at 740, 615 S.E.2d at 85. At bottom, the basic reason that the Department denied ECIM's application was ECIM's failure to document the validity of its assertions of compliance with the applicable review criteria. Any failure on the part of ECIM to adequately document and explain its assertions of compliance would constitute a reasonable basis for denying its application. After reviewing the entire record, we conclude that, since the record contains substantial evidence that supports the Department's findings, since the Department's findings adequately support its conclusions, and since the record contains no other support for ECIM's contention that the Department acted arbitrarily and capriciously in rejecting its application, we cannot conclude that the Department's decision should be overturned as arbitrary and capricious.

III. Conclusion

For the reasons set forth above, we conclude that ECIM has not demonstrated that the Department committed an error of law that necessitates an award of relief. As a result, the Department's decision should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

STATE OF NORTH CAROLINA v. HENRY EUGENE BROWN

No. COA09-1693

(Filed 3 May 2011)

1. Evidence— possession of incestuous pornography book—motive and intent

The trial court did not err in an indecent liberties with a child and first-degree rape case by allowing into evidence under N.C.G.S. § 8C-1, Rule 404(b) defendant father's "Family Letters" book to show both motive and intent in committing the acts underlying the charged offenses. It was reasonable to infer incestuous desire from possession of incestuous pornography, and the admission of this evidence did not unfairly prejudice defendant. To the extent the admission of evidence regarding defendant's alleged sexual encounter with the younger daughter exceeded the scope of permissible corroboration, it did not amount to plain error.

2. Satellite-based Monitoring— lifetime enrollment—aggravated offense—rape of child under thirteen

The trial court did not err in an indecent liberties with a child and first-degree rape case by ordering defendant to enroll in lifetime satellite-based monitoring. Rape of a child under the age of thirteen was an aggravated offense since it necessarily involved the use of force or threat of serious violence.

Appeal by Defendant from judgments entered 17 July 2009 by Judge Dennis J. Winner in Jackson County Superior Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jane Rankin Thompson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defendant Kristen L. Todd, for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

On 31 October 2005, Defendant Henry Eugene Brown ("Brown") was indicted on one count of indecent liberties with a child and one count of first-degree sex offense with a child.¹ Brown was tried

1. On 14 July 2009, just prior to commencement of his trial, Brown was also indicted on one count of statutory rape.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

before a jury at the 13 July 2009 Criminal Session of Jackson County Superior Court, the Honorable Dennis J. Winner presiding. The evidence presented by the State at trial tended to show the following: Brown and his wife have three children, Sally, the victim in this case, Frank, and Jessica.² Sally, the oldest, was ten years old at the time of trial. Sally testified that, during September 2005, Brown took her into his bedroom, removed her clothes, got on top of her, and put his “worm” inside her “private” and moved up and down. She then demonstrated what had happened with dolls. Sally identified pictures she had drawn of herself and her parents illustrating her mother’s “kitty” and her father’s “worm.” Sally stated that this event only happened once. She said that she had reported this event to her mother and her teacher Dorothy Coone (“Coone”) and that she later spoke with a social worker and the police. After reviewing her drawings on redirect examination, Sally indicated that her sister Jessica was on the floor when the event occurred and that when she held her father’s penis she could see her mother’s breasts. Several health care and counseling professionals who had met with Sally corroborated Sally’s story by testifying as to what Sally had told them. Dr. Cynthia Brown (“Dr. Brown”), a child abuse specialist who examined Sally, testified that she found no physical evidence of vaginal or anal penetration, but that finding no evidence of penetration was not inconsistent with a report of sexual abuse, particularly after a lengthy passage of time. Coone testified that Sally had been telling fifth grade boys that her father had raped her.

Amanda Parker (“Parker”), a friend of Brown’s wife whom the Browns used as a caretaker, testified that sometime in early fall 2005, Brown’s wife showed Parker “Family Letters,” an erotic publication containing anonymous “letters” purporting to describe the correspondents’ sexual experiences with other family members. Graphic illustrations accompanied the “letters.” Although the publication upset Parker, she continued to take care of the children.

During the weekend of 25 September 2005, Parker and her sister took the Browns’ children to Asheville for a weekend outing to the fair and mall. Because their outing finished late in the evening, they spent the night at a motel room. While watching a movie in their motel room, Sally told Parker that her father sexually abused her. A discussion between Parker, her sister, and all three children followed. Upon their return to Jackson County on 27 September 2005, Parker

2. Pseudonyms are used to protect the privacy of the juveniles.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

reported the abuse allegations to Kim Davis (“Davis”), a foster care social work supervisor at the Jackson County Department of Social Services (“DSS”). The report triggered an immediate DSS investigation.

Davis and Detective Celeste Holloman (“Detective Holloman”) went to the children’s school to interview them. Initially, the statements they received from Sally were consistent with the reported conversations the children had with Parker. After interviewing the children at school, Davis and Detective Holloman went to the Browns’ home to inform the Browns of the allegations and explain the available custody options. Detective Holloman and Davis were allowed into the Browns’ home and Detective Holloman received permission from the Browns to search the premises. Brown’s collection of adult erotic literature, including Family Letters, was seized during the search. Detective Holloman testified that Brown told her that Family Letters belonged to the Browns.

Brown moved the court to exclude Family Letters from evidence, but the trial court denied Brown’s motion and admitted Family Letters as evidence of Brown’s “intent or motive with respect to the alleged crimes.” The trial court contemporaneously instructed the jury that they could consider the publication only if the jury found the publication relevant to Brown’s motive or intent to commit the charged crimes.

At the close of the State’s evidence, the trial court dismissed the first-degree sex offense charge. Brown then took the stand and denied having any sexual contact with Sally and denied ownership of Family Letters. Brown claimed DSS and other agencies had coached Sally into making the allegations against him and presented evidence of a conversation between Sally and Davis in which Sally stated that her friends told her to lie about what happened and that Brown had not sexually abused her. At the time of the conversation, Sally was living with friends of Brown, and his wife and Brown did not have custody of Sally. Joyce Freeman, Brown’s mother-in-law, testified that when Sally was in her care, Sally stated that her friends told her to lie about sexual abuse and that no such abuse had occurred. James Freeman, Joyce Freeman’s husband, testified that he had heard Sally recant on a different occasion.

At the close of all evidence, Brown was convicted of indecent liberties with a child and first-degree rape. Brown was sentenced to 240 to 297 months on the first-degree rape charge and 13 to 16 months on the indecent liberties charge, which sentences were to run consecutively. Brown was also ordered to register as a lifetime sex offender

STATE v. BROWN

[211 N.C. App. 427 (2011)]

and to enroll in satellite-based monitoring (“SBM”) upon his release from prison. Brown gave timely oral notice of appeal.

*Discussion**I. Trial*

[1] On appeal, Brown first argues that the trial court erroneously “allowed into evidence the ‘Family Letters’ book because it was irrelevant, inadmissible character evidence and substantially more prejudicial than probative.” Brown contends that because “there was no evidence that [he] ever showed the ‘Family Letters’ book, or any type of pornographic material, to [Sally,]” “[t]he ‘Family Letters’ book was not[] relevant to any issue other than [Brown’s] character, and should have been excluded” under North Carolina Rule of Evidence 404(b).

Rule 404(b) provides that while evidence of “other crimes, wrongs, or acts” is not admissible “to prove the character of a person in order to show that he acted in conformity therewith,” such evidence is admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). In this case, the trial court denied Brown’s motion *in limine* to exclude Family Letters because the court found the evidence to be “circumstantial evidence” “bear[ing] upon [Brown’s] intent and motive [] with respect to the alleged crimes.” On appeal, however, Brown argues that denial of his motion was error because evidence that a defendant “simply possessed pornographic materials” is inadmissible under Rule 404(b) absent “evidence that the defendant used the materials during the perpetration of the alleged offense or showed the materials to the victim at or near the time of the crimes.” We disagree. That such evidence is inadmissible under Rule 404(b) absent the existence of such limited circumstances is a misapplication of the rule.

“Rule 404(b) is ‘a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.’ ” *State v. Locklear*, 363 N.C. 438, 447, 681 S.E.2d 293, 301-02 (2009) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)) (emphasis in original). Accordingly, rather than evidence of possession of pornography being generally inadmissible under Rule 404(b) unless the pornography

STATE v. BROWN

[211 N.C. App. 427 (2011)]

was shown to the victim or involved in the commission of the offense, evidence of possession of pornography is generally admissible if it provides relevant “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. Gen. Stat. § 8C-1, Rule 404(b).

In arguing that Family Letters was inadmissible because it was not shown to Sally or was not “used in the commission of the offense,” Brown relies on previous decisions by this Court holding that evidence of possession of pornography, or evidence of deviant sexual conduct, was inadmissible because the evidence in each case did not serve an appropriate Rule 404(b) purpose. *See State v. Bush*, 164 N.C. App. 254, 595 S.E.2d 715 (2004) (evidence of the possession of pornography); *State v. Smith*, 152 N.C. App. 514, 523, 568 S.E.2d 289, 295 (evidence of defendant’s possession of pornographic materials), *disc. review denied, appeal dismissed*, 356 N.C. 623, 575 S.E.2d 757 (2002); *State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244-45 (2000) (evidence that defendant placed a camcorder in a bathroom used by children and others which taped the activities in the bathroom); *State v. Maxwell*, 96 N.C. App. 19, 24, 384 S.E.2d 553, 556-57 (1989) (evidence that defendant frequently appeared nude in front of his children and fondled himself in the presence of his adopted daughter).³ However, these holdings, in light of the inclusive nature of Rule 404(b), cannot be read to create any broadly-applicable rule with respect to the admissibility of pornography in a criminal case.⁴

3. *But see State v. Owens*, No. COA08-1279, 2009 N.C. App. LEXIS 785 (2009) (unpublished) (admitting evidence of “child pornographic video with an incestuous theme, other child pornographic images, and incestuous stories” because the evidence was “relevant to show [defendant’s] intent and motive to commit sexual acts with the nine-year-old female [victim]”).

4. To the extent *Smith* has been interpreted to create a bright-line rule that evidence of the mere possession of pornography is inadmissible to show intent, preparation, plan, knowledge or absence of mistake (the only purposes discussed in *Smith*), *see State v. Delsanto*, 172 N.C. App. 42, 52, 615 S.E.2d 870, 876-77 (2005); *Bush*, 164 N.C. App. at 254, 595 S.E.2d at 715, we note that this Court in *Smith* based its decision solely on the issues before it and was attempting to distinguish that factual context from the contexts of *State v. Rael*, 321 N.C. 528, 533-34, 364 S.E.2d 125, 129 (1988) (holding that evidence of pornographic pictures and movies was admissible to corroborate the four-year-old victim’s testimony that the defendant showed him these items during the commission of the alleged sexual offenses) and *State v. Williams*, 318 N.C. 624, 632, 350 S.E.2d 353, 358 (1986) (holding that evidence of a defendant’s insistence that his daughter attend and watch an x-rated film with him was relevant to show the defendant’s “preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her”), rather than creating a broad rule of inadmissibility. *Cf. Bush*, 164 N.C. App. at 266-68, 595 S.E.2d at 723-24 (Levinson, J. dissenting) (concluding that

STATE v. BROWN

[211 N.C. App. 427 (2011)]

The determination in each case was not whether possession of pornography is ever relevant to serve a purpose other than proving a defendant's propensity to act in a certain way. Rather, the determination in each case was whether possession of pornography *in that case* provided relevant, non-propensity proof under the circumstances of the case. *See Doisey*, 138 N.C. App. at 626, 532 S.E.2d at 244-45 (holding that the evidence of defendant taping "activities in the bathroom" was evidence of "conduct dissimilar to the conduct with which [d]efendant was charged" and, "therefore, did not tend to show [d]efendant's plan or scheme to sexually assault [the victim]"); *Maxwell*, 96 N.C. App. at 24-25, 384 S.E.2d at 556-57 (holding that the evidence of defendant's nudity "tended to make defendant appear to be a sexual deviant" and was of "questionable relevance" because defendant regarded nudity as "normal" and the only testimony involving defendant fondling himself in front of his adopted daughter also revealed that defendant attempted to hide this behavior from her); *Smith*, 152 N.C. App. at 519, 522-23, 568 S.E.2d at 293, 295 (holding that evidence of defendant's "mere possession" of general pornography in his home was irrelevant to show his intent to engage in a sexual relationship with his 12-year-old stepdaughter); *Bush*, 164 N.C. App. 254, 261, 595 S.E.2d 715, 719 (holding that evidence of defendant's possession of general pornography was "tenuously related to the crime charged" and was inadmissible to prove any proper purposes under Rule 404(b)).

The circumstances of this case, however, are easily distinguishable from the above-cited cases: the possession was of an uncommon and specific type of pornography; the objects of sexual desire aroused by the pornography in evidence were few; and the victim was the clear object of the sexual desire implied by the possession. Accordingly, the relevance of the evidence of Brown's possession of Family Letters is not governed by this Court's prior decisions holding as inadmissible evidence of a defendant's possession of general pornography, and we conclude that the trial court correctly admitted evidence of Brown's possession of Family Letters as relevant evidence showing both Brown's motive and intent in committing the acts underlying the charged offenses, two proper purposes for such evidence under Rule 404(b).

Regarding the first Rule 404(b) purpose, the trial court admitted the Family Letters evidence as "circumstantial evidence" bearing

careful analysis of *Smith* "reveals that it neither establishes such a broad and blunt rule, nor could it have" and stating that "*Smith* and the cases it cites require the courts to review each piece of evidence in the context of the case in which it is presented").

STATE v. BROWN

[211 N.C. App. 427 (2011)]

upon Brown's "motive with respect to the alleged crimes." "Motive" is defined as "something within a person (as need, idea, organic state, or emotion) that incites him to action," Websters Third New International Dictionary, (Unabridged 2002), and North Carolina Courts have long held that the State may offer evidence of a defendant's motive "as circumstantial evidence to prove its case where the commission of the act is in dispute when '[t]he existence of a motive is [] a circumstance tending to make it more probable that the person in question did the act.'" *State v. Hightower*, 331 N.C. 636, 642, 417 S.E.2d 237, 240-41 (1992) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 83 (3d ed. 1988)) (bracket in original). In proving motive, our Courts have allowed the State to present evidence of a defendant's lack of monetary resources in a prosecution for robbery, *State v. al-Bayyinah*, 359 N.C. 741, 748, 616 S.E.2d 500, 506 (2005) ("Defendant's statement that he was expected to make a living outside prison clearly shows a motive for the robbery of the grocery business."); evidence of "financial obligations and pending lawsuits against the defendant" in a prosecution for felonious burning, *State v. Harrell*, 20 N.C. App. 352, 356, 201 S.E.2d 716, 718 (1974); evidence of a defendant's opportunity to financially benefit from murder in a prosecution for murder, *State v. Bishop*, 346 N.C. 365, 383, 488 S.E.2d 769, 779 (1997) (noting that "the evidence that defendant sold the victim two life insurance policies and that both policies were amended to make defendant the primary beneficiary was relevant to show a motive for the killing"); and evidence of "defendant's frustration and need to find money" in a kidnapping and murder prosecution, *State v. Parker*, 354 N.C. 268, 286, 553 S.E.2d 885, 898 (2001) (holding that defendant's disturbance at a bank was relevant and admissible to show defendant's need for money and the motivation to commit the kidnapping and ultimate murder), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). In each of these cases where the defendant desired money, evidence of that desire was relevant to show the defendant's motive in committing the acts underlying the offense. Such evidence did not prove, at least in any relevant way, the defendant's propensity to commit the crimes any more than the simple fact of possession of incestuous pornography would show a defendant's propensity to commit statutory rape. However, evidence of a defendant's economic need or greed obviously sheds light on the defendant's potential desire to satisfy that need or greed, and that desire certainly serves as evidence of the defendant's motive to commit the underlying act—robbery, murder, kidnapping, felonious burning—constituting the offense charged. Likewise, evidence of a defendant's incestuous

STATE v. BROWN

[211 N.C. App. 427 (2011)]

pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act—engaging in sexual intercourse with the victim/defendant's child—constituting the offense charged.

The crux of the analysis in all of these cases is whether the evidence is, in fact, relevant to the alleged motivating factor, *i.e.*, whether the desire for money can be inferred from a lack of money or the opportunity to gain money and whether the desire to engage in an incestuous relationship can be inferred from the possession of incestuous pornography. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2009) (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.”); N.C. Gen. Stat. § 8C-1, Rule 401 (2009) (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). As the first is fairly obvious, it is only the second that is relevant in the present case.

It certainly seems reasonable to infer incestuous desire from one's possession of incestuous pornography. Without purporting to speak authoritatively on literary merit in the pornographic context, we find it logical to conclude that one's purpose in reading Family Letters, which can only euphemistically be characterized as “erotica,” is not to enjoy the stylistic flourishes or intricate plot twists. Instead, it can be more reasonably inferred that the reader intends to gratify a sexual desire by reading the stories. Indeed, pornography, by at least one of its definitions, is “a portrayal of erotic behavior *designed to cause sexual excitement*.” *Miller v. California*, 413 U.S. 15, 18-19 n.2, 37 L. Ed. 2d 419, 427 n.2 (1973) (quoting Webster's Third New International Dictionary (Unabridged 1969)) (emphasis added); *see also* Webster's Third New International Dictionary (Unabridged 2002). Where the pornography possessed consists solely of incestuous encounters, there arises a strong inference that the possessor is sexually excited by at least the idea of, if not the act of, incestuous sexual relations. Accordingly, in this case, the fact of Brown's possession of incestuous pornography reasonably supports the inference that Brown was sexually desirous of an incestuous relationship.

Anticipating response to this line of reasoning, it may be argued that admitting evidence of possession of incestuous pornography in a

STATE v. BROWN

[211 N.C. App. 427 (2011)]

case involving incest could open the door for admission of possession of more innocuous-seeming literature in cases where that literature would appear to be relevant. As one panel of the Ninth Circuit Court of Appeals put it: “Woe, particularly, to the son accused of patricide or incest who has a copy of *Oedipus Rex* at his bedside.” *Guam v. Shymanovitz*, 157 F.3d 1154, 1159 (9th Cir. 1998), *rev’d*, *United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007). However, such argument, while superficially intriguing, is particularly overreactive and unpersuasive.

A comparison between possession of Family Letters and possession of *Oedipus Rex*, or any other literature with socio-deviant undertones, is akin to a comparison between possession of a sawed-off shotgun and possession of a Revolutionary War-era pistol. While possession of Family Letters or a sawed-off shotgun strongly supports one obvious inference—that the possessor is desirous of incestuous relationships or that the possessor is “up to no good,” respectively, *cf. United States v. Hood*, 628 F.3d 669, 672 (4th Cir. 2010) (noting that “possession of a sawed-off shotgun is unique in that the weapon has no nonnefarious purposes”)—possession of classic literature or a collectible firearm leads to a myriad of logical inferences about the possessor—that the possessor has an interest in classical Greek tragedy or Revolutionary War-era relics; that the possessor has an appreciation of irony or classic workmanship; that the possessor desires his potential partners to regard him as well-read or sophisticated—none of which necessarily lead to any conclusion about the possessor’s potential patricidal, incestuous, or nefarious motivations. Pornography, especially such singularly specific pornography like Family Letters, provides an obvious inference about the sexual motivations of the possessor in a way that other reading material cannot. Obviously not all pornography provides as strong or obvious an inference as does the incestuous pornography in this case, but the strength, or probative value, of that inference is to be regarded in the balancing test of Rule 403 and does not necessarily require exclusion under Rule 404(b). *See* N.C. Gen. Stat. § 8C-1, Rule 403. In any event, the admissibility of pornography or reading material in general is not at issue in this case. The issue here is simply whether evidence of Brown’s possession of incestuous pornography was properly admitted in the prosecution of Brown for his alleged sexual relations with his daughter. Because such evidence was relevant to establishing Brown’s motive in engaging in the conduct constituting the underlying offense, we conclude that the trial court’s admission of Family Letters was not error.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

We further disagree with Brown's contention that the evidence of Family Letters was not relevant to establishing Brown's intent. Prior to beginning deliberations, the trial court instructed the jury on the charge of attempted first-degree rape.⁵ Specifically, the court instructed the jury that to find Brown guilty on this charge, they would need to find "from the evidence beyond a reasonable doubt that on or about the alleged date, [Brown] *intended* to engage in vaginal intercourse with the victim." A person's intent "is seldom, if ever, susceptible of proof by direct evidence" and "must ordinarily be proven by circumstantial evidence . . . from which it may be inferred." *State v. Petry*, 226 N.C. 78, 80-81, 36 S.E.2d 653, 654 (1946). As discussed *supra*, Brown's desire to engage in incestuous sexual relations may reasonably be inferred from Brown's possession of the incestuous pornography. Further, assuming the jury found that "[Brown] performed an act or acts, which in the ordinary course of events would have resulted in vaginal intercourse by [Brown] with the victim had not [Brown] been stopped in some way from his apparent course of action," the jury could, from Brown's desire to engage in incestuous sexual relations, infer Brown's intent to engage in vaginal intercourse with his daughter, the victim in this case. Accordingly, we conclude that the evidence of Brown's possession of Family Letters was relevant to prove intent and that the trial court did not err in admitting the evidence for that purpose.

Finally, we conclude that the evidence of Brown's possession of Family Letters was also admissible as relevant evidence tending to establish the purpose of Brown's alleged actions with respect to the charged offense of indecent liberties with a minor. As stated by our Supreme Court, the list of permissible purposes for admission of other acts evidence under Rule 404(b) is not exclusive, and "such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Hipps*, 348 N.C. 377, 404, 501 S.E.2d 625, 641 (1998) (emphasis added), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

In this case, Brown was charged with taking indecent liberties with a minor child in violation of N.C. Gen. Stat. § 14-202.1, which provides as follows:

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than

5. Although Brown was only indicted on the charges of first-degree rape and taking indecent liberties with a child, based on the evidence presented at trial, the trial court submitted to the jury the lesser-included offense of attempted first-degree rape.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

the child in question, he [] [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years *for the purpose of arousing or gratifying sexual desire*.

N.C. Gen. Stat. § 14-202.1 (2007) (emphasis added). “The gravamen of the offense of taking indecent liberties under [section] 14-202.1(a)(1) is the defendant’s purpose in undertaking the prohibited act.” *State v. Beckham*, 145 N.C. App. 119, 122, 550 S.E.2d 231, 234 (2001) (citing *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990)). A defendant’s purpose in performing an act, like intent, is a mental attitude and “is seldom provable by direct evidence and must ordinarily be proven by inference.” *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988), *overruled on other grounds*, *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000) (internal quotation marks omitted). “As prior similar acts are admissible to show intent, so may they be admitted to show a defendant’s purpose under [section] 14-202.1(a)(1).” *Beckham*, 145 N.C. App. at 122, 550 S.E.2d at 234.

As discussed *supra*, Brown’s possession of Family Letters strongly supports the inference that Brown’s “sexual desire” included incestuous relationships, and that Brown’s desire was “gratified” or “aroused” by engaging in the conduct constituting the offense charged. Accordingly, Brown’s possession of Family Letters provides clearly relevant evidence to satisfy the statutory requirement that Brown’s conduct with the victim be for the purpose of arousing his sexual desire.⁶

Though we conclude that the evidence of Brown’s possession of Family Letters was properly admitted under Rule 404(b) in that it was relevant to show Brown’s motive, intent, and purpose, it must still be determined whether the evidence passes the Rule 403 balancing test, *viz.*, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (“Once the trial court deter-

6. Although we conclude that the evidence was properly admitted to show intent and motive, were the evidence only admissible to show purpose under section 14-202.1 (and assuming purpose under section 14-202.1 and motive under Rule 404(b) are not the same), the court’s admission of the evidence for an improper purpose such as motive or intent would be non-prejudicial error based on its admissibility to show purpose. *See State v. Harris*, 140 N.C. App. 208, 212, 535 S.E.2d 614, 617 (“[B]ecause the evidence was admissible for a proper purpose (to show a common plan or scheme), the trial court’s error in admitting that same evidence for an improper purpose (lack of consent) is rendered non-prejudicial.”), *disc. review denied*, *appeal dismissed*, 353 N.C. 271, 546 S.E.2d 122 (2000).

STATE v. BROWN

[211 N.C. App. 427 (2011)]

mines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403.” (internal quotation marks omitted)), *disc. review denied, appeal dismissed*, 360 N.C. 653, 637 S.E.2d 192 (2006); *see also* N.C. Gen. Stat. § 8C-1, Rule 403. This second determination “is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision.” *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001).

Regarding the danger of unfair prejudice arising from admission of Family Letters, Brown notes that “[e]veryone at trial seemed to agree that the ‘Family Letters’ book was quite distasteful and even shocking” and that “[n]ot only did it include very specific stories of incestuous activities, but it also contained explicit pictures of such acts being performed.” Brown contends that because the graphic and “shocking” book was “passed around the jury box for each juror to view,” “[i]t is very likely that the book led the jury to convict Mr. Brown based on its disgust with his possession of such materials and on his character, not simply based on the evidence against him.”

However, aside from Brown’s own unsupported contention, there is nothing to show that the jury convicted Brown solely out of “disgust” for the content of Brown’s pornography. As such, we must conclude that the jury’s *potential* disapproval of Brown’s possession of the pornography did not substantially outweigh the strong probative value of the evidence in showing Brown’s motive, intent, and purpose with respect to the alleged conduct. Furthermore, when the trial court admitted Family Letters into evidence, the court issued a limiting instruction to the jury, stating that “[i]f you find the testimony about [Family Letters] to [be] credible, you may consider that only if you find that it bears upon [Brown’s] motive or intent to commit the charged offenses and for no other purpose than that.” As previously stated by this Court, “[t]he law presumes that the jury heeds limiting instructions that the trial judge gives regarding the evidence.” *State v. Riley*, — N.C. App. —, —, 688 S.E.2d 477, 480, *cert. denied*, 364 N.C. 246, 699 S.E.2d 644 (2010). Based on our review of the record, there is nothing to indicate that the jury ignored the trial court’s limiting instruction and considered Family Letters as anything other than evidence of Brown’s motive or intent in committing the alleged conduct. Accordingly, we conclude that the evidence of Brown’s possession of Family Letters did not unfairly prejudice Brown and, therefore, was properly admitted by the trial court.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

Furthermore, we are unpersuaded by Brown's argument that admission of "testimony about alleged sexual acts committed by [Brown] against [Sally's] sister [Jessica]" constituted plain error by the trial court and warranted reversal of the jury's convictions.

At trial, Alisea Pierce ("Pierce"), a community support case manager with Appalachian Community Services, and Mary Holliday ("Holliday"), a contract attorney with DSS, recounted conversations each had with Sally, in which Sally reported that Brown had sex with both Sally and her sister Jessica. Pierce testified that Sally reported that she, along with her sister, "were [dragged] into their father's bedroom with both parents present by their hair, were undressed, and he was undressed as well, that he had sex with her and then with her little sister." Holliday testified to a similar, but more detailed, account, in which Sally reported that Brown "dragged her by her hair to the bedroom," "took [Sally's] clothes off," and "did very, very bad stuff with her private parts and his private parts." Holliday then testified that Sally stated that Brown "started doing the same thing to the sister [Jessica]. [Sally] said she tried to push him off of [Jessica]. But he took [Jessica's] clothes off and did the same thing to her as he'd done to [Sally]." All of this testimony was admitted by the court without any objection from Brown.

On appeal, Brown contends that admission of this testimony was error because the testimony did not corroborate Sally's testimony and was, thus, inadmissible hearsay. Brown argues that any testimony as to what Brown may have done to Jessica contradicted Sally's testimony because Sally "merely testified that her sister was present when the incident with [Brown] occurred" and "never stated that [Brown] went anywhere near, touched, or did anything to [Jessica]." As Brown failed to object to the admission of the testimony by Pierce and Holliday, this Court may only review the alleged error for plain error. N.C. R. App. P. 10(a)(4).

As an initial matter, we note that, although the prior statements by Sally presented by Holliday and Pierce do not exactly mirror Sally's in-court testimony, "[i]n order to be admissible as corroborative evidence, the pre-trial statement of a witness need not merely relate facts brought out in the witness's testimony at trial." *State v. Kim*, 318 N.C. 614, 619, 350 S.E.2d 347, 350 (1986). Rather, "the corroborative testimony may contain new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Howard*, 320 N.C. 718, 724, 360 S.E.2d 790, 793-94 (1987) (internal quotation marks and citations omitted).

STATE v. BROWN

[211 N.C. App. 427 (2011)]

In our view, although Sally testified only that her sister was present when Brown allegedly raped Sally, the evidence of Sally's prior statements regarding sexual acts committed against Sally's sister clearly does not contradict Sally's testimony. Instead, the additional information serves to "strengthen and add credibility to" Sally's version of the events by explaining and expanding upon Jessica's presence during the incident.

Nevertheless, to the extent the admission of the evidence regarding Brown's alleged sexual encounter with Sally's sister exceeded the scope of permissible corroboration, we conclude that the admission of such evidence did not amount to plain error warranting reversal of Brown's convictions.

As previously stated by our Supreme Court,

[t]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). To show plain error, the defendant must convince the Court "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282 (internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

In support of his argument that the erroneous admission of Pierce's and Holliday's testimony amounted to plain error, Brown presents the old plain error saw that "this case basically came down to a swearing contest" between Brown and Sally and asserts that the complained-of testimony "certainly had a profound impact on the jury's view of [Brown] and of the evidence against him."

First, it seems that if the jury believed Pierce's and Holliday's testimony (which we must assume it did, else the error could not have had any impact), the testimony's negative impact on "the jury's view"

STATE v. BROWN

[211 N.C. App. 427 (2011)]

of Brown could only have been slight, if not nonexistent, considering that, absent admission of that portion of the testimony, the jury would have viewed Brown as someone who had sex with only one daughter, but in the presence of the other daughter, instead of viewing Brown as someone who had sex with both of his daughters successively in the same room. Second, although Brown is correct that there was no scientific or physical evidence proving Brown committed the alleged acts, we cannot conclude, in the face of the remainder of Sally's amply-corroborated testimony and the evidence of Brown's motive and intent to commit the alleged acts, that the admission of two statements regarding reports by Sally that Brown also had sex with Sally's sister caused, or even probably caused, the jury to return the verdict that it did. Accordingly, we are not convinced that the admission of the portions of Pierce's and Holliday's testimony referring to Sally's report that Brown raped his other daughter was "fundamental error" that was "so prejudicial, so lacking in its elements that justice cannot have been done." We conclude that the admission of the complained-of testimony was not plain error and that Brown received a fair trial, free of prejudicial error.

II. SBM Hearing

[2] Brown next argues that the trial court erroneously ordered him to enroll in lifetime SBM. We disagree.⁷

At the close of Brown's sentencing, the trial court stated that "this [conviction] is a reportable offense and that it is an aggravated offense and, therefore, [Brown] is subject to lifetime sex monitoring under the current statute when he gets out."⁸ The trial court then issued a "judicial findings and order for sex offenders," in which the

7. Brown's oral notice of appeal in open court was insufficient to confer jurisdiction on this Court with respect to Brown's appeal of the SBM order. *See State v. Brooks*, — N.C. App. —, 693 S.E.2d 204, 206 (2010) (holding that "oral notice pursuant to N.C. R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court" in a case arising from a trial court's order requiring a defendant to enroll in SBM). However, Brown has petitioned this Court to issue a writ of *certiorari* to hear the merits of Brown's appeal of the SBM order. This Court may, in its discretion, issue a writ of *certiorari* "when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). Because the proper method of appeal from an SBM order was not entirely clear until 18 May 2010, when this court decided *Brooks*, and because Brown gave oral notice of appeal on 17 July 2009, we grant Brown's petition for writ of *certiorari*.

8. The trial court did not specify which offense was the aggravated offense, despite the fact that both offenses of conviction were reportable offenses. *See* N.C. Gen. Stat. § 14-208.6(4) (2009). However, the trial court found that Brown was convicted of "rape of a child, [section] 14-27.2A," which leads to the conclusion that the trial court was referring to Brown's first-degree rape conviction under section 14-27.2(a)(1).

STATE v. BROWN

[211 N.C. App. 427 (2011)]

court (1) found that Brown was “convicted of a reportable conviction under [section] 14-208.6, specifically . . . rape of a child, [section] 14-27.2A[;]” (2) found that the “offense(s) of conviction is an aggravated offense[;]” and (3) ordered that “upon release from imprisonment, [Brown shall] be enrolled in a satellite-based monitoring program . . . for his[] natural life.”

On appeal, Brown argues that the trial court erred by finding that “the offense of conviction is an aggravated offense.”⁹ We are unpersuaded.

“[I]n order for a trial court to conclude that a conviction offense is an ‘aggravated offense’ . . . this Court has determined that the elements of the conviction offense must ‘fit within’ the statutory definition of ‘aggravated offense.’” *State v. Phillips*, — N.C. App. —, —, 691 S.E.2d 104, 106 (2010). Section 14-208.6(1a) defines “aggravated offense” as follows:

any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2009). In determining whether the conviction offense “fits within” the definition of “aggravated offense,” this Court has held that the “trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.” *Phillips*, — N.C. App. at —, 691 S.E.2d at 106 (emphasis and internal quotation marks omitted).

In this case, the elements of the charged offenses—indecent liberties with a minor and first degree rape—do not “fit within” the second statutory definition of “aggravated offense” because obviously neither a child under the age of 16 years, nor a child under the age of 13 years, is necessarily also a child less than 12 years old “without looking at the underlying facts[.]” *Phillips*, — N.C. App. at —, 691 S.E.2d at 108; *see also* N.C. Gen. Stat. § 14-27.2 (2005) (“A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the vic-

9. To the extent Brown’s argument is not properly preserved for appeal based on Brown’s admitted failure to contest any of the findings by the trial court during the SBM proceeding, we suspend the North Carolina Rules of Appellate Procedure to address this issue and “prevent manifest injustice” to Brown. N.C. R. App. P. 2.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

tim”); N.C. Gen. Stat. § 14-202.1 (2005) (“A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he [] [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.”).¹⁰

However, according to this Court’s opinion in *State v. Clark*, — N.C. App. —, — S.E.2d — (2011), because rape of a child under the age of 13 “necessarily involves ‘the use of force or threat of serious violence,’ ” “the essential elements of first degree rape [of a child] ‘fit within’ the [first] statutory definition of an “aggravated offense.” *Id.* — at —, S.E.2d at —. Accordingly, we conclude that the trial court properly found that Brown was convicted of an aggravated offense such that enrollment in lifetime SBM was not error. Brown’s argument is overruled.¹¹

Based on the foregoing, we conclude that Brown received a fair trial, free of prejudicial error, and that the trial court did not err in ordering Brown to enroll in lifetime SBM.

10. Under the test created by this Court for application of section 14-208.6, there are no offenses that “fit within” the second definition of “aggravated offense,” *i.e.*, an offense that includes “engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” Every sex offense in the General Statutes either (1) does not mention the victim’s age, *see* N.C. Gen. Stat. §§ 14-27.3 (second-degree rape), 14-27.5 (second-degree sexual offense), 14-27.5A (sexual battery) (2009) or (2) states the relevant age of the victim as something other than “less than 12 years old.” *See* N.C. Gen. Stat. §§ 14-27.2(a)(1) (first-degree rape; “child under the age of 13 years”), 14-27.2A (rape of a child; adult offender; “child under the age of 13 years”), 14-27.4 (first-degree sexual offense; “child under the age of 13 years”), 14-27.4A (sexual offense with a child; adult offender; “child under the age of 13 years”), 14-27.7 (intercourse and sexual offenses with certain victims; “victim who is a minor” or “victim who is a student”), 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old) (2009). Accordingly, that portion of the statute delineating the second definition of “aggravated offense” has been rendered obsolete. *Compare Jolly v. Wright*, 300 N.C. 83, 86, 265 S.E.2d 135, 139 (1980) (stating that statutes are to be construed “so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute’s provisions to be surplusage”); *see also Carlyle v. State Highway Comm’n.*, 193 N.C. 36, 47, 136 S.E. 612, 620 (1927) (in discussion of the rules of statutory construction, stating that “[a]bove all, it is not to be presumed that the Legislature intended any part of a statute to be inoperative and mere surplusage” (internal quotation marks omitted)).

11. As for Brown’s remaining argument that enrollment in SBM violates his protections from *ex post facto* laws, such an argument is unavailing in light of our Supreme Court’s decision in *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010), which holds that subjecting a defendant to the SBM program does not violate the Ex Post Facto Clause of the state or federal constitution.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

NO PREJUDICIAL ERROR at trial. SBM order AFFIRMED.

Judge STEELMAN concurs.

Judge HUNTER, ROBERT N., JR., dissents with a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

The majority opinion conflicts with this Court's decisions in *State v. Smith*, 152 N.C. App. 514, 568 S.E.2d 289 (2002), and *State v. Bush*, 164 N.C. App. 254, 595 S.E.2d 715 (2004). However, if, as the majority contends, *Smith* and *Bush* do not create a bright line rule of exclusion under these facts, the majority's approach is still deficient for two reasons. First, the Family Letters publication's logical relevancy requires an impermissible character inference. Second, the unfair prejudice inherent in this evidence substantially outweighs the publication's probative value. Therefore, I must respectfully dissent.

In *Smith*, we held that "evidence of [the] defendant's possession of pornographic materials, without any evidence that [the] defendant had viewed the pornographic materials with the victim, or any evidence that [the] defendant had asked the victim to look at pornographic materials other than the victim's mere speculation" was irrelevant to establishing whether the defendant was guilty of first-degree sexual offense and taking indecent liberties with a minor. 152 N.C. App. at 523, 568 S.E.2d at 295. In *Bush*, we interpreted the holding in *Smith* to establish the following rule: "[T]he possession of [pornographic materials] is held *only* to show the defendant has the propensity to commit the offense for which he is charged and to be highly inflammatory." 164 N.C. App. at 262, 595 S.E.2d at 720 (emphasis added). Consequently, we explained, "the mere possession of pornographic materials does not meet the test of relevant evidence under Rule 401 of the North Carolina Rules of Evidence." *Id.* Our decision to find error in *Bush* was clearly premised on this expansive reading of *Smith*. See *id.* at 263, 595 S.E.2d at 721 ("We see no way around the facts and holdings in *Smith*, *Doisey* and *Maxwell* in attempting to apply Rule 404(b) to admit the evidence in question."). Therefore, we cannot disregard the articulation of the rule in *Bush* as mere *dicta*, and we are bound to apply it here. See *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby."); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a

STATE v. BROWN

[211 N.C. App. 427 (2011)]

panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

The rule articulated in *Bush* makes no exception for pornography that is thematically similar to the crime charged. Therefore, I would hold the trial court erred in admitting evidence of the Family Letters publication. I would also hold that the error was sufficiently prejudicial to merit a new trial.

More importantly, assuming *arguendo* *Bush* and *Smith* did not create a bright line rule regarding the possession of all pornographic materials, the majority opinion would weaken a critical aspect of the character evidence rule, stripping our case law of a logical stopping point at which the rule comes into effect. North Carolina Rule of Evidence 404 contains the traditional character evidence rule: “Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion” N.C. R. Evid. 404(a). Subsection (b) provides a nonexclusive list of purposes for which uncharged conduct evidence may be offered without violating the character evidence rule. N.C. R. Evid. 404(b); *State v. Everhardt*, 96 N.C. App. 1, 17, 384 S.E.2d 562, 572 (1989), *aff’d*, 326 N.C. 777, 392 S.E.2d 391 (1990). Thus, Rule 404(b) is “a specialized rule of relevancy.” *United States v. Moore*, 732 F.2d 983, 987 (D.C. Cir. 1984); *see also State v. Jeter*, 326 N.C. 457, 459, 389 S.E.2d 805, 807 (1990) (“[W]e have stressed repeatedly that the rule is, at bottom, one of relevancy.”). Logic governs relevancy. If the evidence survives Rule 404, Rule 403 requires the trial court to exclude the evidence if the danger of unfair prejudice, among other things, substantially outweighs probative value. N.C. R. Evid. 403; *see also State v. Gibson*, 333 N.C. 29, 43, 424 S.E.2d 95, 103 (1992) (explaining that evidence not excluded by Rule 404 may still be excluded by Rule 403), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993).

The majority approach disregards a critical principle underlying the character evidence rule: uncharged conduct evidence may not be admitted unless “there is a rational chain of inferences that does not require an evaluation of character.” David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 8.3, at 495 (2009); *accord* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 746-47 (3d ed. 2007). In other words, the proponent must establish the evidence is *logically* relevant without

STATE v. BROWN

[211 N.C. App. 427 (2011)]

relying on a character inference. While Rule 404(b) contains a nonexclusive list of permissible purposes for which evidence may be offered, that evidence must be excluded if its logical link to one of those purposes requires a character inference. *See e.g.*, Mueller & Kirkpatrick, *supra*, § 4:28, at 746-47 (“[P]roof offered [of other bad acts] is not saved from the principle of exclusion by the mere fact that it supports a specific inference to a point like intent if the necessary logical steps include an inference of general character or propensity”); *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (“[W]hen evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, *no link of which may be the inference that the defendant has the propensity to commit the crime charged.*” (emphasis added)); *United States v. Commanche*, 577 F.3d 1261, 1267 (10th Cir. 2009) (“Because of the rule’s structure, we do not read the permissible purposes demarcating the boundaries of 404(b)’s prohibition on propensity inferences as trumping the general proscription contained in the rule.”).¹²

This part of the rule is critical. If a character inference can be used to connect evidence to a non-character purpose, the character evidence rule is effectively a dead letter because any number of character inferences about the defendant could be strung together to reach a “non-character purpose.” A prosecutor cannot establish a proper purpose by merely mouthing the magic words “motive, opportunity, intent, preparation, plan, knowledge, identity” and so forth. He or she must articulate *how* the evidence is logically relevant to such a purpose without requiring a character inference.

Here, an impermissible character inference is necessary to establish the Family Letters publication’s logical relevancy to Brown’s motive or intent to commit the crimes charged. The following logical reasoning is required to establish motive: (1) Brown was in possession of a publication describing incestuous encounters in graphic detail; (2) Brown is the type of person who desires to engage in incest

12. *Accord, e.g., United States v. Rubio-Estrada*, 857 F.2d 845, 846 (1st Cir. 1988) (“The result is a compromise. Where the past bad act is relevant *only* because it shows bad character (*i.e.*, the proposed logical inference includes character as a *necessary* link), Rule 404 *automatically* excludes the evidence.”); *United States v. Desmarais*, 938 F.2d 347, 350 (1st Cir. 1991); *Masters v. People*, 58 P.3d 979, 996 (Colo. 2002); *State v. Hopson*, 735 So. 2d 81, 87 (La. Ct. App. 5th Cir. 1999); *People v. Crawford*, 582 N.W.2d 785, 794 (Mich. 1998); *State v. Fardan*, 773 N.W.2d 303, 326 (Minn. 2009); *State v. Clifford*, 121 P.3d 489, 498 (Mont. 2005); *State v. Bassett*, 659 A.2d 891, 896 (N.H. 1995); *State v. McGinnis*, 455 S.E.2d 516, 523 (W. Va. 1994).

STATE v. BROWN

[211 N.C. App. 427 (2011)]

because he reads graphic literature about incest; (3) Brown had a motive to engage in sex with his children: satisfying his incestuous desires; (4) Brown has a propensity to engage in sexual intercourse with relatives; and therefore, (5) the admission of the Family Letters publication tends to suggest Brown molested Sally.

Similar reasoning is required with respect to intent: (1) Brown was in possession of a publication describing incestuous sexual encounters in graphic detail; (2) Brown is the type of person who desires to engage in incestuous sex because he reads graphic literature about incest; (3) Brown intended to engage in sex with his children to satisfy his incestuous desires; and therefore, (4) the admission of the Family Letters publication tends to suggest Brown molested Sally.

In an attempt to justify this line of reasoning, the majority draws an analogy to several cases involving monetary gain as a motive. The majority contends that, if evidence of a desire for monetary gain is admissible to establish a defendant committed a crime to satisfy his monetary desire, then evidence of Brown's desire to engage in incest is admissible to prove Brown committed a crime to satisfy his sexual desire. Under this reasoning, *no* uncharged conduct reflecting on motive would be excluded by the character evidence rule. Evidence of a prior conviction for murder would be admissible in a murder trial because the prior conviction suggests the defendant is the type of person who *desires* to kill people—by killing the victim, the defendant was seeking to satisfy that desire. The same would be true for rape convictions in rape cases and larceny convictions in larceny cases.

But what distinguishes the forbidden use of motive evidence from the proper use of motive evidence? A moral judgment about the defendant. As the late Professor David Leonard explained,

motive reasoning requires two steps. In the context of uncharged misconduct evidence, the first step is from the evidence to the existence of a motive, and the second is from the motive to action in conformity therewith. This looks very similar to character reasoning. How, then, does it differ? . . . The character rule is based on the deeply entrenched view that trials are conducted to determine what happened in the situation at issue and not to judge the morality of the parties. Because a person's "character" is driven by her morality, the law restricts evidence offered to prove character.

. . . .

STATE v. BROWN

[211 N.C. App. 427 (2011)]

. . . [T]he law assumes that motive is more specific than character, and its existence in a given situation does not depend on the person's morality. Under the right set of circumstances, even non-violent people can possess a motive to act violently, and honest people can have a motive to lie. . . . We assume that a motive might exist because *any person* might possess one under those specific circumstances. The tendency to have such a motive is simply *human*; it does not derive from a trait of character specific to the person involved in the trial.

Leonard, supra, § 8.3, at 494-96 (footnotes omitted). Thus, “[a]ll character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence.” Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777, 794 (1981). And a propensity inference is also a *character* inference if it involves a moral judgment about the defendant.

Monetary gain as motive to commit a violent crime does not *require* a moral judgment about the defendant. Rather, it can rely on the assumption that human beings are more likely than not to engage in conduct that will improve their financial circumstances. The defendant therefore has a motive to commit the crime, and no character inference is required to reach this conclusion. The existence of the motive makes it more likely than not that the defendant committed the crime.¹³ See *Leonard, supra*, § 8.5.1, at 514-18 (explaining why evidence of uncharged misconduct suggesting motives of greed, a need for money, or the like do not run afoul of the character evidence rule).

The majority's analogy to monetary-gain-motive cases fails because the reasoning in those cases does not apply to a propensity to engage in depraved sexual misconduct. The Family Letters publication cannot be relevant to Brown's propensity to commit a sex offense without inferring he has a depraved sexual interest in incest. This is a *moral judgment specific* to Brown in contrast to the general, non-moral inference in monetary gain cases. As the majority explains, “[w]here the pornography possessed consists solely of incestuous encounters, there arises a strong inference that the possessor is sexually excited by at least the idea of, if not the act of, incestuous sexual encounters.” Sometimes it can be very difficult to ascertain the

13. Whether this connection is probative *enough* in comparison to the suggestion that the defendant was motivated by greed because he is an evil person must be evaluated under the Rule 403 balancing test.

STATE v. BROWN

[211 N.C. App. 427 (2011)]

difference between permissible propensity evidence and impermissible character evidence—but not in this case. The publication is quintessential character evidence. *See, e.g., United States v. Curtin*, 489 F.3d 935, 963 (2007) (Kleinfeld, J., concurring) (“Using a person’s perverse sexual fantasies to prove action in conformity therewith is exactly what subsection (a) of Rule 404 prohibits.”).

The majority also maintains that, even if the Family Letters publication was inadmissible to establish Brown’s motive and intent to commit first-degree sexual offense, it was admissible to establish the “purpose” element of the indecent liberties offense. To be guilty of the crime of taking indecent liberties, the defendant must engage in the prohibited conduct “for the purpose of arousing or gratifying sexual desire.” N.C. Gen. Stat. § 14-202.1(a)(1) (2009). Establishing this purpose element is a “proper purpose” for offering evidence under Rule 404(b). *State v. Beckham*, 145 N.C. App. 119, 122, 550 S.E.2d 231, 234 (2001).

However, the trial court instructed the jurors to consider the Family Letters publication *only* if it bore on Brown’s “motive or intent to commit the crime charged.” There is no mention of considering the publication for the purpose of determining whether Brown possessed the requisite mental state for the purpose of indecent liberties. Based on this instruction, it is unlikely the jury would have used the publication to determine Brown’s “purpose” within the meaning of the statute.

Moreover, this theory of logical relevancy *still requires a character inference*: (1) Brown was in possession of a publication containing descriptions of incestuous encounters in graphic detail; (2) Brown is the type of person who desires to engage in incest because he fantasizes about incest; and therefore, (3) his purpose in engaging in sexual activity with a family member was to gratify this sexual desire.

Brown’s theory of the case was not that he engaged in sexual conduct with his daughters *without the purpose of arousing or gratifying sexual desire*. Rather, it was his contention at trial that the alleged conduct did not occur. Thus, the publication was not offered to explain why potentially innocent conduct was actually committed with the requisite mental state. Furthermore, under the majority’s approach, the State would be able to evade the character evidence rule for general intent crimes, including most sexual offenses, by tacking on a specific intent offense, such as indecent liberties.

Even assuming there is some relevancy that does not require a character inference, the legitimate probative value of the publication

STATE v. BROWN

[211 N.C. App. 427 (2011)]

would be so minor that, when compared with the greater danger of unfair prejudice, admitting the evidence clearly fails the Rule 403 balancing test. When conducting this test, we consider two things to evaluate probative value: (1) the degree of similarity between the extrinsic conduct and the charged conduct and (2) the time elapsed between the incidents. *See State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996); *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988) (“Nevertheless, the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.”); Jeff Welty, UNC School of Government, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant* 14 (2009), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0904.pdf> (“Cases sometimes suggest that this analysis is required by Rule 404(b), but it is better understood as an application of the balancing test of Rule 403.”). My review of the publication indicates the only similarity between the stories contained in the Family Letters publication and Brown’s alleged conduct is their incestuous nature. None of the stories describing sexual encounters between parents and their offspring appear to involve young children, and none of the stories state the characters are below the age of consent. Regardless of the familial relationship involved, none of the stories involve a forced sexual encounter. Thus, the only commonality is incest—the publication has no probative value for the pedophilic and force aspects of the crimes charged. Furthermore, there was no testimony that Brown actually read Family Letters, and there was conflicting testimony as to whether Brown had ever *seen* the publication prior to its discovery by the police.

On the other hand, in admitting the evidence, there was a great danger of unfair prejudice. The publication contains numerous graphic descriptions of incestuous sexual activity between closely related family members. It describes encounters between parents and their children, between siblings, between grandparents and grandchildren, and so on. The stories are accompanied by graphic cartoon illustrations of the conduct described in the stories. The publication also contains advertisements for various sexual products, including a variety of “sex-toys” and numerous videos that purport to cater to what might be described by many as “bizarre” or “non-mainstream” sexual fetishes. Particularly in sex crime cases involving incest, this type of evidence is highly likely to inflame the passions of the jury

STATE v. BROWN

[211 N.C. App. 427 (2011)]

and cause jurors to assume the defendant committed the crime because he is a sexual deviant.

The majority's indecent-liberties-purpose theory not only suffers from low probative value, but using the publication to establish Brown's purpose is superfluous in light of the unfair prejudice. There was direct testimony from Sally that Brown forced her to perform oral sex. Evidence of the act itself is sufficient to establish Brown sought to gratify a sexual desire.

The trial court's limiting instruction was insufficient to mitigate the extreme danger of unfair prejudice. While there is a presumption "that the jury heeds limiting instructions that the trial judge gives regarding the evidence," *State v. Riley*, — N.C. App. —, —, 688 S.E.2d 477, 480 (2010), it cannot be presumed that a limiting instruction is automatically sufficient to negate highly inflammatory evidence. Otherwise, we could discard the unfair prejudice component of Rule 403. Limiting instructions are particularly ineffective in uncharged conduct cases, where the jury is highly likely to consider evidence for an impermissible purpose and conclude the defendant should be convicted based on his bad character. *See, e.g., United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (stating that, when prior convictions are admitted, " 'the naive assumption that prejudicial effects can be overcome by instructions to jury' becomes more clearly than ever 'unmitigated fiction.' " (quoting *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L. Ed. 790, 799 (1949) (Jackson, J., concurring))).

Once prior bad acts of the accused are introduced in evidence and handed over to the jury for review, the realistic prosecutor, defense counsel, and trial judge know that the jury will use that bad character evidence to reason that the accused is a person of bad character or predisposition, and ought to be convicted of the present offense because of his prior history. The usual limiting instruction certainly makes the cold-type record look better to a reviewing court, but the efficacy of such an instruction has been questioned by professors and judges for decades. It is another example of repeating the same act and expecting different results.

Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble With Rule 404(b)*, 78 Temp. L. Rev. 201, 250 (2005) (footnote omitted).¹⁴ While the publication should have been excluded on char-

14. *See also* Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 Law & Hum. Behav. 477, 494 (1988) ("[T]he legal assumption that instructions reduce juror

STATE v. HUNT

[211 N.C. App. 452 (2011)]

acter evidence/relevancy grounds, even if there was some modicum of *legitimate* probative value, it was substantially outweighed by the danger of unfair prejudice.

In sum, the majority opinion contradicts our decisions in *Smith* and *Bush* and also fails to appreciate that uncharged conduct evidence cannot rely on a character inference to establish its logical relevancy. The trial court improperly admitted the Family Letters publication in violation of Rule 404. Furthermore, the danger of unfair prejudice posed by that evidence substantially outweighed its probative value in violation of Rule 403. These errors constitute an abuse of discretion.

Several decisions note that our courts have been “markedly liberal” in admitting uncharged conduct in sex crime cases. *E.g.*, *State v. Scott*, 331 N.C. 39, 52, 413 S.E.2d 787, 794 (1992). But a liberal trend of admissibility is not a rule of law. “Good prosecution proves that the defendant committed the crime. Bad prosecution proves that the defendant is so repulsive he ought to be convicted whether he committed it or not.” *Curtin*, 489 F.3d at 963.

I dissent.

STATE OF NORTH CAROLINA v. SAMUEL KRIS HUNT, DEFENDANT

No. COA10-666

(Filed 3 May 2011)

1. Sexual Offenses— second-degree—mentally disabled victim—evidence not sufficient

The trial court erred by denying defendant’s motion to dismiss a charge of second-degree sex offense where defendant contended that there was insufficient evidence that the victim was mentally disabled. The first element of mental disability under N.C.G.S. § 14-27.1(1) is “mental retardation;” however, there is a

bias is false in many instances.”); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37, 47 (1985) (concluding that “the presentation of the defendant’s criminal record does not affect the defendant’s credibility, but does increase the likelihood of conviction, and that a judge’s limiting instructions do not appear to correct that error”).

STATE v. HUNT

[211 N.C. App. 452 (2011)]

wide range of abilities among those with such a diagnosis and the evidence must also show that the victim was substantially incapable of appraising the nature of his or her conduct, of resisting a sexual act, or of communicating unwillingness to submit to a sexual act. The State's evidence did not satisfy the latter requirement.

2. Sexual Offenses— crime against nature—mentally disabled victim—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss the charge of crime against nature where the State's theory was that defendant committed the offense against a mentally disabled person who was incapable of consenting to any sexual acts. There was insufficient evidence that she was incapable of consenting.

Appeal by defendant from judgment entered on 8 October 2009 by Judge Edwin G. Wilson, Jr. in Superior Court, Randolph County. Heard in the Court of Appeals 26 October 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth J. Weese, for the State.

M. Alexander Charns, for defendant-appellant.

STROUD, Judge.

Samuel Kris Hunt ("defendant") appeals from a trial court's order convicting him of second-degree sexual offense and a crime against nature. Because the State failed to present sufficient evidence of the victim's mental disability, we reverse and vacate defendant's convictions.

I. Background

On 21 July 2008, defendant was indicted for second-degree sexual offense and a crime against nature. On 6 October 2009, defendant was tried on these charges during the Criminal Session of the Superior Court, Randolph County. The State's evidence tended to show that defendant lived with his wife and five children in Asheboro, North Carolina. On 25 May 2008, defendant's daughter Madison¹ had her sixteenth birthday party in the park, and her friend, Clara², age seventeen, attended the party. Clara and another girl decided to spend the night at defendant's house watching movies with Madison. Defendant and

1. We will refer to the defendant's minor daughter by the pseudonym Madison to protect her identity and for ease of the reading.

2. We will refer to the victim by the pseudonym Clara to protect her identity and for ease of reading.

STATE v. HUNT

[211 N.C. App. 452 (2011)]

his wife left the house around 9:00 p.m. and did not return until around 3:00 a.m. the next morning. Clara testified that when defendant returned, she was in the living room watching a movie with Madison and the other children in the house. Defendant first went to the bedroom but came back and sat down in the living room. Defendant then tapped Clara on the arm and motioned for her to follow him into the kitchen. Once in the kitchen, defendant began touching Clara on her breasts, vagina, and her “[b]utt.” Defendant then “took his penis out[,]” and forced Clara’s head down to his penis and she “[t]ried to pull away.” Clara then put defendant’s penis in her mouth and when she tried to raise her head, defendant pushed her head back down to his penis a second time and it went into her mouth again. Defendant then told her “Don’t tell nobody. I can get in serious trouble.” Defendant told Clara to go to his bedroom but instead she returned to the living room. Five minutes later Clara told the other girl spending the night with them what defendant had done. Later that morning, Clara told Madison that Madison’s father had touched her and she had “sucked his dick.” Clara left defendant’s residence, returned home, and told her father what had happened. Her father took her to the police station to give a statement about what happened. Defendant was subsequently detained by police.

The State also presented evidence of Clara’s mental disability. Clara testified that at the time of trial, she was in 12th grade, that she was getting A’s and B’s in school, planning to get a driver’s license, and planning to attend the local community college after graduation. Clara testified that she had babysat for “a lot of people” in her neighborhood and paid her own bills. There was evidence presented that at the time of trial, she was living with her boyfriend and his mother.

Additionally, the State presented testimony from Asheboro Police Department Investigator Deborah McKenzie that she knew Clara from when she served as a school resource officer at Clara’s middle school and she testified that Clara acted “child-like for her age group[.]” Lisa Cheek, a social worker with the Asheboro City School System, testified that she had known Clara for more than three years. Ms. Cheek testified that there were

three levels at the school [for] children with exceptional disabilities, some with the higher levels, IQ levels, can be placed in the regular classrooms. Some who fall where they can’t be in the regular classrooms and learn, go to the occupational skills course of study. And then those who cannot go out into the workforce or have really severe problems go into the functional skills class.

STATE v. HUNT

[211 N.C. App. 452 (2011)]

Ms. Cheek further testified that

[a]s long as I've known [Clara], she's been in the occupational course of study level [the middle range], which is a class for special-for kids that have learning disabilities that kind of go at a slower pace. And . . . they go out into the workforce and they work hours and come back in. They have to have so many hours to graduate.

Ms. Cheek also testified that contrary to Clara's testimony, the Randolph County Department of Social Services ("DSS") paid her bills for her. Cheryl Lackey from the Randolph County DSS confirmed that DSS did pay Clara's bills and she further testified that Clara had a developmental disability and "her IQ is lower than 70." Heather Cox, a special education teacher at Asheboro High School, testified that Clara was "classified as intellectually disabled in the mild category" and that "IQ-wise 100 is average" and Clara has an IQ of 61. Ms. Cox also testified that Clara was in a

modified curriculum. They still do English, math, social studies, science, but it's—it's more job skill oriented. They learn how to write a resume. They learn how to make change. They learn how to balance a checkbook, basic things. They're not headed to college; this group is not. So it's things that they will use in the workforce as well as, you know, in their life after they graduate.

Ms. Cox further testified that it would be "really difficult" but not impossible for Clara to get an associate's degree from Randolph Community College and she was in the top range of her level of achievement at school in her classes. Following the State's presentation of evidence, defendant moved for dismissal based on insufficiency of the evidence and the trial court denied defendant's motion.

Defendant testified that on the night in question he had gone out drinking with his wife and another couple. He testified that when he returned home, he believed that Clara was interested in a sexual encounter. Defendant admitted that Clara performed oral sex on him but claimed that this contact was consensual. Defendant testified that Clara had been to his house before to call boyfriends. He had talked to Clara's father on about three occasions and her father said that he was proud of Clara and she was a "straight A student." On 26 May 2008, the morning after the alleged incident with Clara, defendant drove to the Asheboro police station and gave a statement admitting that he engaged in fellatio with Clara in the kitchen of his home but

STATE v. HUNT

[211 N.C. App. 452 (2011)]

the encounter was consensual. Defendant denied knowing that Clara had any mental disability until the police informed him that she did. At the close of the presentation of all evidence, defendant again moved for dismissal based on insufficiency of the evidence, which was subsequently denied by the trial court.

On 8 October 2009, a jury found defendant guilty of second-degree sexual offense and a crime against nature. The trial court consolidated the two convictions and sentenced defendant to a term of 73 to 97 months imprisonment. Defendant gave notice of appeal in open court.

On appeal defendant contends that his judgments should be vacated and his convictions reversed because (1) the trial court erred by not granting defense counsel's motion for a mistrial after his conflict of interest became apparent, as he was accused of suborning perjury, coaching a child witness, and making false statements to the court; (2) the trial court erred by not granting defendant's motion to dismiss the charges based on the insufficiency of the evidence; and (3) he was provided ineffective assistance of counsel at trial. We find the issue of insufficiency of the evidence dispositive and thus we will address only this issue.

II. Insufficiency of the evidence

[1] Defendant argues that there was insufficient evidence presented by the State to show that Clara was "mentally disabled" for the purposes of establishing second-degree sexual offense. Specifically, defendant argues that "there was no expert testimony that [Clara] was so substantially incapable of appraising the nature of her conduct or resisting any sexual act or communicating unwillingness to submit to any sexual act[,] but, to the contrary, the State's evidence showed that she performed well in high school, babysat neighborhood children, planned to attend community college, was living with her boyfriend, and there was some indication that she was pregnant at the time of trial, but DSS had not raised any objection to her sexual relations with her boyfriend. The State, citing testimony from Clara's special education teacher, the police investigator, and the high school and DSS social workers, argues that "there was substantial evidence that [Clara] was mentally disabled."

A. Standard of review

It is well established that

STATE v. HUNT

[211 N.C. App. 452 (2011)]

[t]he proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Martin, 195 N.C. App. 43, 50, 671 S.E.2d 53, 59 (2009) (citation omitted). “In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (citations, and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Second-degree sexual offense

Defendant was charged with second-degree sexual offense. N.C. Gen. Stat. § 14-27.5 (2007), in pertinent part, states that

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

- (1) By force and against the will of the other person; or
- (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

See State v. Williams, — N.C. App. —, —, 698 S.E.2d 542, 544 (2010) (“To support the charge of second-degree sexual offense, the State was required to present substantial evidence that the defendant (1) engaged in a sexual act; (2) with a person who is mentally disabled, mentally incapacitated, or physically helpless; and (3) knew or should reasonably have known that the other person is mentally disabled, mentally incapacitated, or physically helpless.”) “One who is mentally disabled under the sex offense laws is statutorily deemed incapable of consenting to intercourse or other sexual acts.” *Williams*, — N.C. App. at —, 698 S.E.2d at 544. (citation, brackets, and quotation marks omitted). N.C. Gen. Stat. § 14-27.5(a)(1) is not

STATE v. HUNT

[211 N.C. App. 452 (2011)]

applicable to the facts before us, as the trial court did not instruct the jury on the use of force. Additionally, there was no evidence presented showing that Clara was “mentally incapacitated, or physically helpless[.]” Therefore, those portions of N.C. Gen. Stat. § 14-27.5 are not relevant to our analysis.

The trial court did give the jury the following instruction as to “mental disability[:.]”

Second, that the victim was mentally disabled. A person is mentally disabled if she suffers from a mental retardation or mental disorder and this mental retardation or mental disorder temporarily or permanently renders her substantially incapable of appraising the nature of her conduct, or resisting a sexual act or communicating unwillingness to submit to a sexual act.

According to N.C. Gen. Stat. § 14-27.1(1) (2007), “mentally disabled” means:

(i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act.

The State did not contend that Clara had a “mental disorder” which “temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act.” *See id.* Therefore, the dispositive issue before us is whether the evidence presented by the State was sufficient to show that Clara suffered from (1) mental retardation; (2) which “temporarily or permanently render[ed] [her] . . . substantially incapable of appraising the nature of . . . her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act.” *See id.* We hold that the State’s evidence was not sufficient to satisfy this element of the crime of second-degree sexual offense.

1. Mental retardation

The first element of “mental disability” under N.C. Gen. Stat. § 14-27.1(1) is “mental retardation.” The phrase “mental retardation” is not further defined in Article 7A of our General Statutes; therefore, we must assume that the legislature intended its ordinary meaning to apply. *See 1 Lafayette Transp. Serv., Inc. v. Robeson Cty.*, 283 N.C. 494, 500,

STATE v. HUNT

[211 N.C. App. 452 (2011)]

196 S.E.2d 770, 774 (1973) (“Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted.”). The ordinary meaning of “mental retardation” is

subaverage intellectual ability equivalent to or less than an IQ of 70 that is accompanied by significant deficits in abilities (as in communication or self-care) necessary for independent daily functioning, is present from birth or infancy, and is manifested esp. by delayed or abnormal development, by learning difficulties, and by problems in social adjustment.

Merriam-Webster’s Collegiate Dictionary 775 (11th ed. 2005). Courts have considered the definition of mental retardation in many contexts, both criminal and civil. The United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 153 L. Ed. 2d 335 (2002), which held that capital punishment of mentally retarded defendants is a cruel and unusual punishment prohibited by the 8th Amendment of the United States Constitution, discussed this definitional problem, noting that:

The American Association on Mental Retardation (AAMR) defines mental retardation as follows: “*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992).

The American Psychiatric Association’s definition is similar: “The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.” *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed.

STATE v. HUNT

[211 N.C. App. 452 (2011)]

2000). “Mild” mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Id. at 308 n.3, 153 L. Ed. 2d at 342 n.3. The United States Supreme Court recognized that the determination of mental retardation is essentially a medical diagnosis which is based upon a combination of factors.

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id. at 318, 153 L. Ed 2d at 348 (footnotes omitted). For the purpose of sentencing in a capital punishment case, our legislature has defined “mentally retarded” as “[s]ignificantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.” N.C. Gen. Stat. § 15A-2005(a)(1)(a) (2007).

All of the definitions of “mental retardation” noted in the statutes and caselaw above are generally consistent with the dictionary definition. All of the definitions include three elements: (1) subaverage intellectual ability; (2) significant deficits in abilities needed for independent daily functioning; and (3) the condition was present from a young age. The State presented evidence that Clara had a low I.Q., below 70, or 61, which would be in the range of mental retardation. The State also presented evidence that Clara had some deficits in abilities needed for daily living, although whether they were substantial or significant deficits may be debatable. In addition, her condition was present from a young age. But even if the evidence was sufficient to establish “mental retardation[,]” N.C. Gen. Stat. § 14-27.1(1) requires not just a diagnosis of mental retardation, but also evidence that the mental retardation is of such a degree that it “temporarily or permanently renders the victim substantially incapable of appraising

STATE v. HUNT

[211 N.C. App. 452 (2011)]

the nature of his or her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act.” N.C. Gen. Stat. § 14-27.1(1) thus recognizes that there is a wide range of abilities among those who have a diagnosis of mental retardation. Some are able to function well in society and live independently or with minimal assistance, while others cannot.

2. Renders victim substantially incapable of resistance

The second element of the definition of “mental disability” addresses the victim’s ability to resist a sexual advance. Even if the State’s evidence satisfied the ordinary definition of “mental retardation,” it did not demonstrate that Clara was “substantially incapable of appraising the nature of . . . her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act[.]” as stated in N.C. Gen. Stat. § 14-27.1(1). The State presented the following evidence regarding Clara’s mental capacity: Clara was in the top range of her level of achievement at high school in her classes, making A’s and B’s; she babysat neighborhood children; she planned to get her driver’s license and to attend community college after graduation; at the time of trial, she was living with her boyfriend and his mother; and there was some indication that she was pregnant but there had been no DSS intervention or charges filed against the boyfriend.³ Clara was also described as “childlike”; she attended classes for children with learning disabilities; she was classified as intellectually disabled in the mild category, with an I.Q. of 61; DSS paid her bills for her; and it would be difficult for her to get an associate’s degree from the local community college.

In *State v. Williams*, — N.C. App. —, 698 S.E.2d 542 (2010), and *State v. Washington*, 131 N.C. App. 156, 506 S.E.2d 283 (1998), this Court addressed the issue of whether there was sufficient evidence to establish the victim’s mental disability. In *Williams*, the defendant was convicted on one count of second-degree sexual offense and one count of a crime against nature. *Id.* at —, 698 S.E.2d at 544. On appeal, the defendant contended that the trial court erred as “there was insufficient evidence that [the victim] was mentally disabled pursuant to North Carolina General Statutes, section 14-27.1(1).”

3. Were we to accept the State’s argument that Clara’s diagnosis of mental retardation along with the evidence of her capabilities as presented at trial are sufficient to show that she is unable to consent to a sexual act under N.C. Gen. Stat. § 14-27.1(1), Clara would be legally incapable of ever consenting to sexual acts with anyone, including her boyfriend, and he—or even her future husband, should she ever marry—would be subject to criminal liability for any sexual activity with Clara.

STATE v. HUNT

[211 N.C. App. 452 (2011)]

Id. Specifically, the defendant argued that there was insufficient evidence to show that the victim was substantially incapable of resisting a sexual act, pursuant to N.C. Gen. Stat. § 14-27.1(1). *Id.* at —, 698 S.E.2d at 545. Citing *State v. Oliver*, 85 N.C. App. 1, 20, 354 S.E.2d 527, 538 (1987), this Court noted that

the element of “substantially incapable of . . . resisting the . . . sexual act” is not negated by the victim’s ability to verbally protest or even to engage in some physical resistance of the abuse. The words “substantially incapable” show the Legislature’s intent to include within the definition of “mentally [disabled]” those persons who by reason of their mental retardation or disorder would give little or no physical resistance to a sexual act.

Id. The trial court noted that expert testimony showed that the victim had a full scale I.Q. of fifty-eight, placing him in the range of mild mental retardation[;] . . . had difficulty expressing himself verbally; was able to read very simple words like go, cat, and in; was able to solve very simple addition and subtraction problems; and had difficulty answering questions about social abilities, every-day-life tasks.

Id. (quotation marks and brackets omitted). The victim’s sister testified that the victim “needed daily assistance with cooking, washing his clothes, and making sure he brushed his teeth.” *Id.* (quotation marks and brackets omitted). The victim testified that he did not want the defendant to perform oral sex on him and also told police that “he did not want the incident to take place.” *Id.* This Court concluded that notwithstanding the victim’s unwillingness to receive oral sex, “defendant completed the sexual act, allowing an inference that [the victim] was unable to resist the sexual act.” *Id.* This Court then held that “[w]hen taken in the light most favorable to the State, a reasonable juror could find that [the victim] was substantially incapable of resisting a sexual act and was ‘mentally disabled’ pursuant to North Carolina General Statutes, section 14-27.1(1).” *Id.* at —, 698 S.E.2d at 546.

Likewise in *Washington*, the defendant was indicted on two counts of second-degree rape⁴ and two counts of second-degree sexual

4. A person can be found guilty of second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3 (2007) “if the person engages in vaginal intercourse with another person: . . . Who is *mentally disabled*, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.” (Emphasis added).

STATE v. HUNT

[211 N.C. App. 452 (2011)]

offense. *Id.* at 159, 506 S.E.2d at 285. At trial, the State presented expert witness testimony from Dr. Monty Grubb, as an expert “in the field of psychology, specifically in the field of working with, counseling, and treating mentally retarded people.” *Id.* at 164, 506 S.E.2d at 288. For over a year, Dr. Grubb had met with the victim “once a month for counseling sessions lasting twenty to thirty minutes.” *Id.* at 164, 506 S.E.2d at 289. Dr. Grubb testified

that [the victim] was mentally retarded. Based on his experiences and on his review of psychological evaluations performed on [the victim], Dr. Grubb testified that [the victim] functions around the level of an eight-year-old, both mentally and emotionally. He testified that [the victim’s] ability to make informed decisions about “anything complicated” is significantly decreased by her mental retardation. In Dr. Grubb’s words, “She can’t evaluate a lot of different things and put it together and make a decision in her own best interest most of the time. Weighing all the consequences and all the information is something that she is not very capable of doing.”

Id. at 164-65, 506 S.E.2d at 289. In response to the State’s question as to how the victim “would react to a sexual advance made by an adult with whom she was only vaguely familiar[,]” Dr. Grubb answered that the victim “might ‘freeze,’ because her ‘initial reaction could be so emotionally laden, not realizing what was happening, . . . given the emotional nature of the situation[,]’ ” and, consequently, she “might easily be taken advantage of by a stranger.” *Id.* at 165, 506 S.E.2d at 289. On appeal from his conviction on all charges, the defendant contended that “the trial court erred by denying his motion to dismiss all charges.” *Id.* at 166, 506 S.E.2d at 290. This Court noted that

if there is substantial evidence that a person has engaged in prohibited sexual conduct in violation of G.S. 14-27.3 or 14-27.5, and that the victim was mentally defective, and that the person performing the act knew or reasonably should have known that the victim was mentally defective, then *ipso facto*, there is substantial evidence that the person has engaged in such conduct “by force and against the will” of the victim.

Id. at 167, 506 S.E.2d at 290. In affirming the denial of the defendant’s motion to dismiss, this Court held that

there was substantial evidence that defendant engaged in both vaginal intercourse and a “sexual act” with [the victim]; . . . that [the victim] was mentally retarded, and that defendant knew of

STATE v. HUNT

[211 N.C. App. 452 (2011)]

[the victim's] retardation[;] . . . [and] that [the victim's] mental retardation rendered her substantially incapable of "resisting the act of vaginal intercourse or a sexual act."

Id.

We first note that the Court in *Williams* inferred from the victim's actions that he "was unable to resist the sexual act[.]" as required by N.C. Gen. Stat. § 14-27.1(1) because the victim testified that he did not want the sexual act performed but ultimately allowed the defendant to perform the sexual act. — N.C. App. at —, 698 S.E.2d at 545. Yet this inference was based in part on the expert's testimony that the victim "had difficulty expressing himself verbally; was able to read very simple words like go, cat, and in; was able to solve very simple addition and subtraction problems; and had difficulty answering questions about social abilities, every-day-life tasks." *Id.* Here, defendant forced Clara's head down to his penis and she "[t]ried to pull away[.]" indicating that she did not want to perform the sexual act but ultimately did perform oral sex on defendant. There was no evidence that Clara had difficulty with communication; she also promptly reported defendant's acts to her friend, Madison, her father and the police on the day of the incident and testified at trial clearly, with little if any indication that she had difficulty understanding or answering questions from counsel. We cannot draw an inference regarding Clara's inability to resist a sexual advance, as did the court in *Williams*, as there was no expert testimony regarding the effect of her mental retardation upon her ability to communicate resistance to sexual advances. The evidence here demonstrates that Clara was functioning at a much higher level than the victim in *Williams*, as she was performing well in school and social situations. The expert witnesses in *Williams* and *Washington* testified about the nature and extent of each victim's mental retardation, noting the victim's communication and reading skills, social abilities, mental and emotional age, cognitive limitations, decision-making skills, and responses to sexual advances by adults. This expert testimony was based on their professional knowledge, psychological evaluations performed on the victims, and from observations made during counseling sessions. Here, unlike *Williams* or *Washington*, all of the State's witnesses were lay witnesses and none were qualified as experts in evaluating or treating persons with mental disabilities.⁵ N.C. Gen. Stat. § 8C-1,

5. Although we recognize that a teacher or a social worker may have specialized training which could permit her to testify as an expert witness, no witness in this case was proffered as an expert or presented testimony as an expert witness.

STATE v. HUNT

[211 N.C. App. 452 (2011)]

Rule 701 (2007) limits lay witnesses' testimony to "the form of opinions or inferences . . . to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." It is possible that in some cases a lay witness may have sufficient knowledge and understanding of the victim or the victim's disability may be so severe and obvious that "rationally based on [his] perception[s][,]" *see id.*, he could provide evidence to support a finding that the victim's mental retardation or mental disorder was such that the victim was "substantially incapable of appraising the nature of his or her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act." *See* N.C. Gen. Stat. § 14-27.1(1). In this case, the witnesses did not, and as lay witnesses could not, give an opinion that Clara, who has mild mental retardation but is also functional enough to perform well in school and communicate well with others is "[m]entally disabled" as defined by N.C. Gen. Stat. § 14-27.1(1), based only on their perceptions. N.C. Gen. Stat. § 8C-1, Rule 702(a) (2007) states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." As illustrated by *Williams* and *Washington*, an expert witness qualified to evaluate the victim's mental retardation and ability to function was necessary in this situation to provide the "scientific, technical or other specialized knowledge[,]" *see id.*, to assist the jurors in understanding the extent of Clara's mental retardation and to discern whether she was "substantially incapable of appraising the nature of . . . her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act." *See* N.C. Gen. Stat. § 14-27.1(1).

We note that in cases where a defendant who is charged with a crime claims to be mentally retarded, our Courts have frequently relied on expert opinions to determine the existence and extent of a defendant's mental retardation. *See State v. Ortez*, 178 N.C. App. 236, 247-48, 631 S.E.2d 188, 196-97 (2006) (the Court considered contrasting expert witness testimony regarding the extent of the defendant's mental retardation in determining whether defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights), *appeal dismissed and disc. review denied*, 361 N.C. 434, 649 S.E.2d 642 (2007); *State v. Nicholson*, 355 N.C. 1, 56, 558 S.E.2d 109, 145-46 (2002) (holding no error in the trial court not giving a peremptory instruction on

STATE v. HUNT

[211 N.C. App. 452 (2011)]

the mitigating factor—"The age of the defendant at the time of the crime"—for purposes of capital punishment sentencing pursuant to N.C. Gen. Stat. § 15A-2000(f)(7) because the defendant's "mental age was by no means established by a consensus of experts" as the defendants' experts testified that the 32 year old defendant's mental age was between 12 1/2 and 13 years of age and between "mild mental retardation and borderline IQ" but other expert witnesses testified that "his social skills were described as 'pretty good' and as 'his biggest strength.' "; *State v. Zuniga*, 348 N.C. 214, 217-18, 498 S.E.2d 611, 613 (1998) (because expert witness testimony established that the defendant had "a history of mild to moderate mental retardation and organic brain syndrome of moderate range[;]" and an IQ of 56 or 64, indicating a mental age of 7.4 years; and had very low impulse control, it was prejudicial error for the trial court not to submit the N.C. Gen. Stat. § 15A-2000(f)(7) mitigating circumstance regarding the defendant's age at the time of the crime to the jury). In addition, the expert evaluation of mental retardation normally requires specialized testing, including IQ tests and other psychological tests, as well as observation of the person who is being evaluated, to determine the existence and degree of mental retardation.

Likewise in civil cases, our Courts have relied on expert opinions to determine the existence and extent of a party's mental retardation. *See In re LaRue*, 113 N.C. App. 807, 811-12, 440 S.E.2d 301, 303-04 (1994) (the trial court erred in terminating the parental rights of the parents as the expert witness testimony that they had "IQ scores of 71 and 72[;]" were "borderline" mentally retarded, and did not exhibit "significant defects in adaptive behavior" did not support a conclusion "that they are mentally retarded within the meaning of N.C. Gen. Stat. § 7A-289.32(7)"); *Gilliam v. Perdue Farms*, 112 N.C. App. 535, 537, 435 S.E.2d 780, 781 (1993) (the trial court in holding that there was competent evidence to support the Industrial Commission's conclusion that the claimant was disabled relied in part on expert testimony that the claimant's "functional capacity assessment" revealed that he was "cognitively dysfunctional and appear[ed] to be mentally retarded"); *Suggs v. Snow Hill Milling Co.*, 100 N.C. App. 527, 530-31, 397 S.E.2d 240, 241-42 (1990) (this Court relied in part on expert testimony that the plaintiff "had [a] considerable mental handicap" in determining that competent evidence supported the Industrial Commission's findings).

In this case, the necessity for expert testimony is highlighted by defendant's claim that he did not know and reasonably would not

STATE v. HUNT

[211 N.C. App. 452 (2011)]

know from his observations of Clara that she was mentally disabled, as his knowledge of her disability is also an element of second-degree sexual offense under N.C. Gen. Stat. § 14-27.5. Defendant claimed, and Clara's own testimony confirmed, that he knew Clara as one of his daughter's friends who attended school, was a good student, and appeared to function as a normal 17 year old girl.

Accordingly, we hold that in situations such as presented by this case, where the victim's IQ falls within the range considered to be "mental retardation[.]" but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by N.C. Gen. Stat. § 14-27.5. Here no expert witness testified as to the extent of Clara's mental disability. Even when viewed in the light most favorable to the State, *see Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455, the State's lay witness testimony was insufficient to establish that Clara's mental retardation "temporarily or permanently render[ed] [her] . . . substantially incapable of appraising the nature of . . . her conduct, or of resisting . . . a sexual act, or of communicating unwillingness to submit to . . . a sexual act." *See* N.C. Gen. Stat. § 14-27.1(1). Thus, we hold there was insufficient evidence to satisfy this required element of second-degree sex offense. *See* N.C. Gen. Stat. § 14-27.5. Therefore, the trial court erred in not granting defendant's motion to dismiss for insufficient evidence as to this charged offense.

C. Crime against Nature

[2] Defendant, citing *State v. Whiteley*, 172 N.C. App. 772, 616 S.E.2d 576 (2005), argues that since there was insufficient evidence of second-degree sexual offense, there was also insufficient evidence of the crime against nature, so the trial court erred in denying his motion to dismiss on that charge. The State counters that the trial court properly denied defendant's motion to dismiss for insufficiency of the evidence as to the crime against nature charge, as this charge "was based on non-consensual sexual acts[.]"

N.C. Gen. Stat. § 14-177 (2007) states that "[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." "[T]he legislative intent and purpose of G.S. 14-177 . . . is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." *State v. Stubbs*, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966). The act of fellatio is considered a crime against nature. *State v. Poe*, 40 N.C. App.

STATE v. HUNT

[211 N.C. App. 452 (2011)]

385, 387-88, 252 S.E.2d 843, 844-45, *cert. denied and appeal dismissed*, 298 N.C. 303, 259 S.E.2d 304 (1979), *appeal dismissed*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980).

In *Whiteley*, the defendant challenged the constitutionality of N.C. Gen. Stat. § 14-177 in light of the United States Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003). 172 N.C. App. at 773, 616 S.E.2d at 577-78. The Court in *Whiteley* noted that in *Lawrence* the Court held that a Texas law "prohibiting 'deviate sexual intercourse' with a member of the same sex violated the due process clause, where the individuals charged were adults engaging in consensual, private sexual activity[.]" and that the holding in *Lawrence* was "based on the unconstitutional infringement of the liberty interest in private, intimate acts between consenting adults." 172 N.C. App. at 776, 616 S.E.2d at 579 (citing *Lawrence*, 539 U.S. at 574-75, 578, 156 L. Ed. 2d at 523, 525). The Court in *Whiteley* also noted that the "liberty interest in personal relations" in *Lawrence* did have limitations as the opinion "clearly indicates that state regulation of sexual conduct involving minors, non-consensual or coercive conduct, public conduct, and prostitution falls outside the boundaries of the liberty interest protecting personal relations and is therefore constitutionally permissible." *Id.* at 776-77, 616 S.E.2d at 579-80. In holding that N.C. Gen. Stat. § 14-177 was constitutional on its face, in light of the holding in *Lawrence*, the Court held "that section 14-177 may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation[.]" *Id.* at 779, 616 S.E.2d at 581. In addressing the defendant's argument as to the application of N.C. Gen. Stat. § 14-177 to the facts before them, the Court held that "in order for the application of section 14-177 to be constitutional post-*Lawrence* . . . the State must prove beyond a reasonable doubt that defendant committed the sexual act, . . . and that such an act was non-consensual." *Id.* at 779, 616 S.E.2d at 581. In applying this rule, the Court held that the trial court had erred in its instructions to the jury "[a]s the jury was not instructed to consider whether the act was committed without [the victim's] consent[.]" *Id.* at 780, 616 S.E.2d at 581.

The State alleged that defendant committed the crime of second-degree sexual offense because he engaged in a sexual act with Clara, a mentally disabled person who was incapable of consenting to any sexual acts. *See Williams*, — N.C. App. at —, 698 S.E.2d at 544. Thus, the State's proof of the lack of consent is based solely upon

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

Clara's inability to consent because of her mental disability. Yet we held above that the State presented insufficient evidence to meet N.C. Gen. Stat. § 14-27.1(1)'s definition of "mentally disabled." Just as there was insufficient evidence to show that Clara was incapable of consenting for purposes of proving the charged crime of second-degree sexual offense, there was also insufficient evidence to prove that Clara was incapable of consenting for purposes of a N.C. Gen. Stat. § 14-177 crime against nature charge, under the standard established by *Whiteley*. Thus, the State did not present sufficient evidence to "prove beyond a reasonable doubt that defendant committed the sexual act, . . . and that such an act was non-consensual." *Whiteley*, 172 N.C. at 779, 616 S.E.2d at 581. Accordingly, the trial court erred in denying defendant's motion to dismiss as to the crime against nature charge. As there was insufficient evidence of both of the charges against defendant and the trial court erred in not granting defendant's motion to dismiss, we reverse and vacate defendant's convictions for second-degree sexual offense and the crime against nature.

VACATED.

Chief Judge MARTIN and Judge STEPHENS concur.

BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY AND
LAURA B. ISLEY, PLAINTIFFS v. ROY A. COOPER, III THE COOPER COMMITTEE,
JULIA WHITE, STEPHEN BRYANT, AND KRISTI HYMAN, DEFENDANTS

No. COA10-243

(Filed 3 May 2011)

1. Interlocutory orders and appeal—substantial right—immediately appealable

Defendants' appeal from the trial court's order denying their motion for summary judgment in a defamation *per se* and unfair and deceptive trade practices case affected a substantial right and was immediately appealable.

2. Trials—law of the case—same issues—questions settled

The trial court did not err in a defamation *per se* and unfair and deceptive trade practices case by treating *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25 (*Boyce I*), as controlling law of

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

the case. Because many of the same issues from *Boyce I* arose on review in this case, the questions settled in the Court of Appeals' prior opinion were controlling here.

3. Unfair Trade Practices— defamation—genuine issue of material fact—false statements—denial of summary judgment

The trial court did not err in a defamation *per se* and unfair and deceptive trade practices case by denying defendants' motion for summary judgment. There was, at the very least, a genuine issue of material fact as to whether the statements made in defendants' political advertisement were false.

4. Unfair Trade Practices— defamation—genuine issue of material fact—actual malice

The trial court did not erroneously fail to grant defendants' motion for summary judgment in a defamation *per se* and unfair and deceptive trade practices case. There were genuine issues of material fact as to whether defendants acted with actual malice as to plaintiff Daniel Boyce in the airing of a political advertisement. As for the remaining plaintiffs, there was a genuine issue of material fact as to whether the actual malice standard was applicable.

5. Unfair Trade Practices— defamation—statements of or concerning plaintiffs—determination controlling

The trial court did not err by denying defendants' motion for summary judgment as to all plaintiffs other than Dan Boyce in a defamation *per se* and unfair and deceptive trade practices case. In *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, (*Boyce I*) the Court of Appeals determined that statements in the political advertisement were "of or concerning" plaintiffs and that determination was controlling in this case.

6. Unfair Trade Practices— genuine issue of material fact—defamation—sufficient evidence

The trial court did not erroneously fail to find that there was no genuine issue of material fact with respect to plaintiffs' unfair and deceptive trade practices cause of action because plaintiffs were able to forecast sufficient evidence to support a defamation cause of action.

Appeal by Defendants from order entered 8 May 2009 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 1 September 2010.

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

Boyce & Isley, PLLC, by G. Eugene Boyce and R. Daniel Boyce; Patterson Diltthey, LLP, by Ronald C. Diltthey; and Blanchard, Miller, Lewis & Isley, PA, by Philip R. Isley, for Plaintiffs-Appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Charles E. Coble; and Smith Moore Leatherwood, LLP, by Alan W. Duncan, Allison O. Van Laningham, and Stephen M. Russell, Jr., for Defendants-Appellants.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens, for Amicus The North Carolina Press Foundation, Inc.

BEASLEY, Judge.

Defendants appeal from a trial court order denying their motion for summary judgment. After a review of the record evidence and relevant authority, we affirm the trial court's order.

The underlying facts of this appeal have been discussed at length in *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002) ("Boyce I") and *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 611 S.E.2d 175 (2005) ("Boyce II"). The relevant factual and procedural background is as follows: In 2000, Defendant, Roy A. Cooper, III and Daniel Boyce, respectively, sought election to the Office of North Carolina Attorney General. Dan Boyce ran in opposition to Cooper. Beginning in late October 2000, the following television advertisement was broadcasted throughout North Carolina:

I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.

....

Dan Boyce-his law firm sued the state, charging \$28,000 an hour in lawyer fees to the taxpayers.

The Judge said it shocks the conscience.

Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.

Dan Boyce, wrong for Attorney General.

On 22 November 2000, Plaintiffs filed suit raising, in relevant part, defamation *per se* and unfair and deceptive trade practices causes of action against Defendants. In their complaint Plaintiffs alleged that:

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

[t]he Defendants conspired and acted in concert to publish knowingly false words defaming Boyce & Isley, PLLC, the member attorneys of Boyce & Isley, PLLC and Dan Boyce, as candidate for the position of North Carolina Attorney General. Said spoken and written words intentionally placed in the negative attack ad were known by Defendants to be false and defamatory at the time they were made, and were made with reckless disregard for whether they were true [or] false.

On 6 April 2000, the trial court granted a motion to dismiss made by Defendants pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs appealed from the trial court's order. In *Boyce I* our Court reversed the portion of a trial court order that dismissed Plaintiffs' defamation and unfair and deceptive trade practices causes of action, holding that "[t]he allegations in plaintiffs' complaint sufficiently pled their claim of defamation by defendants to overcome a Rule 12(b)(6) motion to dismiss." *Boyce I*, 153 N.C. App. at 35, 568 S.E.2d at 901. Both the Supreme Court of North Carolina and the United States Supreme Court declined to hear Defendants' appeal from our decision in *Boyce I*.

On remand from *Boyce I*, Defendants answered Plaintiffs' complaint raising several constitutional defenses and moved for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. *Boyce II*, 169 N.C. App. at 573, 611 S.E.2d at 176. The trial court denied Defendants' motion for judgment on the pleadings and Defendants appealed. *Id.* In *Boyce II*, dismissing Defendant's appeal as interlocutory, our Court held that "[D]efendants have failed to carry their burden of showing that this case affects a substantial right which will be lost if the substance of this appeal is not heard now." *Id.* at 578, 611 S.E.2d at 179. On 15 April 2009, following a second remand to the trial court, Defendants moved for summary judgment arguing that no genuine issues of material fact existed with respect to Plaintiffs' defamation and unfair and deceptive trade practices cause of action. On 8 May 2009, the trial court denied Defendants' motion for summary judgment as to Roy A. Cooper, III, The Cooper Committee, and Julia White. Defendants filed their notice of appeal to this Court on 11 May 2009. On appeal, Defendants argue that: (I) "the trial court erred by treating *obiter dictum* from a prior appellate decision as law of the case;" (II) "the trial court erred by denying [their] motion for summary judgment because Plaintiffs cannot prove the political ad is false;" (III) "The trial court erred by denying [their] motion for sum-

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

mary judgment because Plaintiffs cannot prove Defendants acted with actual malice;" (IV) "the trial court erred by denying [their] motion for summary judgment as to all Plaintiffs other than Dan Boyce because they cannot prove [that] the political ad was 'of and concerning' them; and (V) "the trial court erred by denying [their] motion for summary judgment because Plaintiffs cannot establish liability under chapter 75."

Interlocutory Order and Motion to Dismiss

[1] By motion filed with this Court, Plaintiffs seek to dismiss Defendants' appeal from the denial of the trial court's summary judgment order.¹ Plaintiffs argue that Defendants' appeal from the order is "interlocutory" and "premature." We disagree.

Generally, interlocutory trial court orders are not immediately appealable to this Court. *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007). "An interlocutory order or judgment is one which is 'made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.'" *Carcano v. JBSS, LLC*, — N.C. App. —, — 684 S.E.2d 41, 47 (2009) (quoting *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 37, 626 S.E.2d 315, 320 (2006)). Our Court has recognized that an order denying a litigant's request for summary judgment is interlocutory in nature. *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 542 S.E.2d 227 (2001). While immediate appeals from interlocutory orders are generally impermissible, there are two exceptions:

First, a party may appeal where the trial court enters a final judgment with respect to one or more, but less than all of the parties or claims, and the court certifies the judgment as immediately appealable under Rule 54(b) of the North Carolina Rules of Civil Procedure. A party may also appeal an interlocutory order if it affects a substantial right and will work injury to the appellant if not corrected before final judgment.

Romig v. Jefferson-Pilot Life Ins. Co., 132 N.C. App. 682, 685, 513 S.E.2d 598, 601 (1999) (internal quotations and citations omitted).

1. We also note that there are three motions to strike and a motion for sanctions filed by Defendants are before this panel for review. After a review, we perceive no "substantial" or "gross" violation of the rules of appellate procedure. Accordingly, we deny Defendants' motions and address the substantive issues that arise from this action. See N.C. R. App. (34); See *Dogwood Dev. & Mgmt Co., LLC, v. White Oak Transp.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008).

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

“[I]t is the appellant’s burden to present appropriate grounds for this Court’s acceptance of an interlocutory appeal” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 254 (1994).

In the present case, the trial court’s order affects a substantial right belonging to Defendants. Our Courts apply a two-step test to determine whether an interlocutory order affects a substantial right and is therefore immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). “[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.” *Id.* at 726, 392 S.E.2d at 736. Whether a substantial right is affected depends upon the particular facts, circumstances, and procedural context presented in each case. *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984); *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

Our Courts have recognized that because a misapplication of the actual malice standard when considering a motion for summary judgment “would have a chilling effect” on a defendant’s right to free speech, a substantial right is implicated. *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2003) (*per curiam* adoption of dissent 153 N.C. App. 662, 670-71, 571 S.E.2d 75, 80-81 (2002) (Greene, J., dissenting)). In *Boyce II*, our Court addressed this issue as it related to Defendants’ motion for judgment on the pleadings. There, citing *Priest*, Defendants argued that “our Supreme Court has recently recognized that the constitutional defenses available to a defendant in a defamation case affect a substantial right and are immediately appealable on the merits.” *Boyce*, 169 N.C. App. at 575, 611 S.E.2d at 177 (internal quotation marks omitted). Our Court declined to extend the holding in *Priest* to Defendants’ appeal from a motion for judgment on the pleadings. *Id.* at 576, 611 S.E.2d at 177. Likening a motion for judgment on the pleadings to a motion to dismiss, we reasoned that because in a motion to dismiss the trial court was not actually required to “apply” the actual malice standard, the Court’s reasoning in *Priest* was inapplicable. *See id.* at 577, 611 S.E.2d at 178 (explaining that “on a [motion to dismiss], the court need only decide if the elements of the claim, perhaps including actual malice, have been [properly] alleged, not how to apply that standard.”). In the present case, Defendants appealed from a trial court’s order denying their motion to dismiss an order for summary judgment. In the motion, Defendants generally sought to apply the defense of actual malice to Plaintiffs’

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

cause of action. As a candidate for a public office, Dan Boyce was subject to the actual malice standard. In determining that there was a genuine issue of material fact as to Plaintiffs' defamation cause of action, the trial court was required to apply the actual malice standard to the facts and circumstances presented specifically in this appeal. Accordingly, we review the substantive legal issues raised by Plaintiffs' appeal.

Standard of Review

It is well established that a motion for summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). When reviewing a summary judgment order "this Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001). The party moving for summary judgment has the burden of establishing the lack of any triable issue. The moving party may meet this burden by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828 (1995) (citation omitted). "Once the moving party meets its burden, then the non-moving party must 'produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.'" *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Defendants' Appeal

I.

[2] Defendants first argue that the trial court erred by treating *Boyce I* as controlling law of the case. We disagree and hold that because many of the same issues from *Boyce I* arise on review in this case, the questions settled in our prior opinion are controlling here.²

2. Though commentators suggest, and we are concerned, that this Court misapplied defamation law in *Boyce I*, See Hugh Stevens, *Boyce & Isley, PLLC v. Cooper*

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

“Where an appellate court decides questions and remands a case for further proceedings, its decisions on those questions become the law of the case, both in the subsequent proceedings in the trial court and upon a later appeal, where the same facts and the same questions of law are involved.” *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997). “However, the general rule only applies to issues actually decided by the appellate court. The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case.” *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (2000) (internal quotation marks and citations omitted).

Most relevant to this case, our Court in *Boyce I* determined that:

the allegedly false statements, when viewed through the eyes of an average person and in the context of the advertisement as a whole, are defamatory *per se*. Defendants’ statements directly maligned plaintiffs in their profession by accusing them of unscrupulous and avaricious billing practices. Contrary to defendants’ contentions, no innuendo or reference to ethical rules governing attorney conduct is necessary to conclude that the advertisement charged plaintiffs with committing contemptible business practices. *See Ellis*, 326 N.C. at 224, 388 S.E.2d at 130 (holding that the language in a letter by the defendant company, taken in the context of the entire letter, was defamatory, in that it accused the plaintiff company of committing an unauthorized act and so impeached the plaintiff company in its trade). Nor do we conclude that such accusations were ambiguous. We doubt that defendants intended their advertisement as a compliment to plaintiffs’ skills and abilities as “top-notch” attorneys, and we do not conclude that the average person would otherwise interpret the advertisement in a non-derogatory fashion. *See McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 146, 729 N.E.2d 364, 372 (2000) (holding that, where a cartoon published by a candidate for political office unambiguously depicted the opposing candidate engaging in unlawful and unethical activity, such cartoon was not reasonably susceptible to more than one meaning and was thus defamatory), *cert. denied*, 531 U.S. 1078, 148 L. Ed. 2d 674 (2001).

and the Confusion of North Carolina Libel Law, 82 N.C. L. Rev. 2017 (2004), without review by the Supreme Court of North Carolina, we are bound by the earlier decision even if erroneous.

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

Boyce I, 153 N.C. App. at 32, 568 S.E.2d at 899. Because our Court held that the statements in the advertisement were indeed defamatory, this question is settled in the case at bar.

On a motion for judgment on the pleadings, the trial court is required to assume that the facts alleged in the complaint are true, and review the remaining questions of law. *See Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 322, 660 S.E.2d 577, 583 (2008). When reviewing a libel *per se* cause of action, the trial court must initially determine whether the statements or publications are subject to a single interpretation. *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 318, 312 S.E.2d 405, 409 (1984). Once a court has concluded that only one meaning can be derived from the publication, the court must determine whether the publication was defamatory. *Id.* Only after answering both questions affirmatively, should the libel *per se* be submitted to the jury. *Id.* Ultimately, “[w]hether a publication is libelous *per se* is a question of law for the court.” *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899.

In *Boyce I*, reviewing a motion for judgment on the pleadings, our Court determined that assuming that the statements in the advertisement were false, they were defamatory as a matter of law. In this case, reviewing the trial court’s denial of the motion for summary judgment, the initial inquiry as to the defamatory nature of the statements is settled. While a different standard of review is applied on a motion for summary judgment, the analysis as to the defamatory nature of the statements remains unchanged. Now, the only question remaining is whether Plaintiffs sufficiently forecast evidence to submit the defamatory statements to the jury. After a review of the record, we find that Plaintiffs presented sufficient evidence to submit the libel *per se* action to the jury.

Defendants argue that because this action is at a different stage of appeal, the prior determinations in *Boyce I* are not controlling. However, the cases cited by Defendant are distinguishable. In those cases cited by Defendants, the application of the differing standard of review, altered the reviewing court’s inquiry. For example, in *Southland Assoc. Realtors v. Miner*, the plaintiff real estate broker filed suit, seeking a commission for securing a buyer for the defendant’s home. 73 N.C. App. 319, 319-20, 326 S.E.2d 107, 107 (1985). Addressing this action earlier, this Court previously reversed a trial court order granting summary judgment for the plaintiffs, determining that genuine issues of material fact remained unresolved. *Id.* On remand, the defendants moved to dismiss the action pursuant to Rule

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

12(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* The trial court denied the motion and the case proceeded to trial, with the plaintiffs recovering damages as a result. *Id.*

Thereafter, the defendant appealed the trial court's decision arguing that because "the Court of Appeals' prior decision reversing summary judgment for plaintiff finally adjudicated the contractual issue between the parties," the earlier 12(b)(6) motion should have been granted. *Id.* at 320, 326 S.E.2d at 107-08. On review, our Court held that the statements relating to the merit of the contractual agreement made in the summary judgment decision were not controlling when considering the motion to dismiss. *Id.* at 321, 326 S.E.2d at 108. Our Court reasoned that the summary judgment proceeding was not before the court for a decision on the merits. Therefore, "the statement upon which the defendants rely was based upon limited evidence within the record on appeal, was not necessary to the holding that an unresolved issue of fact existed, and was not binding on the subsequent proceedings in the trial court." *Id.*

Here, as to the initial questions of law that must be addressed by the Court, the inquiry from the prior opinion is the same; therefore, our reasoning from the prior opinion is controlling. The application of the differing standards of review on summary judgment would not alter our conclusion in this case. We also note that on review of a motion for summary judgment we no longer assume that the facts alleged in the complaint are true, and any ruling on the facts in the prior case are not controlling as a matter of law in the present case. Accordingly, we hold that the defamatory nature of the 2000 political advertisement was settled in *Boyce I.*

II.

[3] Defendants next argue that the trial court erred by denying their motion for summary judgment because Plaintiffs cannot show that the political ad was false. We disagree.

"In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. Leggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987) (emphasis added). Truth is a defense to a libel action. *Holleman v. Aiken*, 193 N.C. App. 484, 668 S.E.2d 579 (2008).

A thorough review of the record reveals that there is, at the very least, a genuine issue of material fact as to whether the statements

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

made in Defendants' political advertisement are false. In *Boyce I*, addressing a motion for judgment on the pleadings, our Court had to take the allegations in Plaintiffs' complaint as true. *See Boyce I*, 153 N.C. App. at 29, 568 S.E.2d at 897-98. On review of summary judgment, our Court must determine whether there is a genuine issue of material fact as to whether Plaintiffs' political advertisement was indeed false. This inquiry requires our Court to review the forecast of evidence presented by Plaintiffs. *See Purvis*, 175 N.C. App. at 477, 624 S.E.2d at 383.

Primarily, Plaintiffs argue that Defendants' political advertisement falsely asserts that Dan Boyce's law firm sued the state. The statements in Defendants' political advertisement in 2000 arose from a 1995 class action suit seeking to recover "refunds of intangibles taxes paid for the years 1991 through 1994 to the State of North Carolina." Plaintiff, Eugene Boyce, was listed as counsel in this action. On 10 June 1997, Eugene Boyce filed a fee petition with the court seeking compensation for his participation in the case. In the petition Eugene Boyce identified himself as "Eugene Boyce, Esq., of the Boyce Law Firm[.]" On appeal, Plaintiffs present numerous documents indicating that at the time that Eugene Boyce filed the fee petition, he was a solo practitioner and that the other Plaintiffs listed in this action did not participate in the class action tax suit. Moreover, Plaintiffs present additional evidence that Boyce & Isley, PLLC, was not formed until after the petition in the 1995 tax case was filed. Accordingly, when viewed in a light most favorable to Plaintiffs, there is a genuine issue as to whether the advertisements' assertions were indeed false. Defendants' argument is without merit.

III.

[4] Next, Defendants argue that the trial court erroneously failed to grant their motion for summary judgment because Plaintiffs cannot forecast sufficient evidence to show that Defendants acted with actual malice. We disagree.

"In actions for defamation, the nature or status of the parties involved is a significant factor in determining the applicable legal standards." *Proffitt v. Greensboro News & Record*, 91 N.C. App. 218, 221, 371 S.E.2d 292, 293 (1988). In *New York Times Co. v. Sullivan*, the United States Supreme Court prohibited public officials from recovering for alleged defamatory statements relating to their official conduct without first proving that the statement was made with actual malice. 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706 (1964). The

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

Court defined actual malice as a statement made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* Later, in *Curtis Publishing Co. v. Butts*, the principle set forth in *Sullivan* was extended to “public figures.” 388 U.S. 130, 18 L. Ed. 2d 1094 (1967). Public figures are categorized as “involuntary public figures, all purpose public figures, and limited purpose public figures.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 664 (2000) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 41 L. Ed. 2d 789, 808 (1974)). “Under North Carolina law, an individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.” *Id.* at 786, 534 S.E.2d at 665 (internal quotation marks and citations omitted).

In this case, the trial court appropriately denied Defendants’ motion for summary judgment. As a candidate for political office, Dan Boyce is required to show actual malice in his defamation cause of action. See *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 436, 291 S.E.2d 852, 858 (1982) (holding that the standard of actual malice is applicable to a political candidate). A series of e-mail correspondence between Julia White (White), communications director for Cooper’s political campaign, and other members of the campaign, tended to show defendants knew that neither Daniel Boyce nor Boyce & Isley, PLLC were involved with the Smith case. The e-mail correspondence at a minimum reveals that defendants “in fact entertained serious doubts as to the truth of [the] publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267 (1968). Taken in their worst light, they show that defendants had full knowledge that Daniel Boyce had no connection whatsoever with the attorney’s fees petition filed in the Smith case. Rather than abandon what they perceived to be a “zinger” of a political advertisement, they decided to proceed regardless of the facts.

There is a vast amount of evidence in this case. Defendants have presented evidence that tends to contradict the above-quoted e-mails. However, it is the role of the jury to resolve conflicts in the evidence, not the trial court at summary judgment. Under Rule 56, the trial court can grant summary judgment only where “there is no genuine issue as to any material fact” and a party “is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56. The learned trial court correctly determined that there were genuine issues of material fact as to whether defendants acted with actual malice as to Daniel Boyce in the airing of the political advertisement.

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

As for the remaining Plaintiffs, there is a genuine issue of material fact as to whether the actual malice standard is applicable. Defendants argue that the remaining Plaintiffs are limited purpose public figures. However, Defendants fail to present any evidence that the fees sought by Eugene Boyce in the class action suit involved a public controversy. Even assuming that Eugene Boyce's legal fees from the 1995 class action tax case involved a public controversy, there is no evidence that the remaining Plaintiffs thrust themselves into the "vortex" of this controversy.

In *Gaunt*, our Court determined that the plaintiff inserted himself into the "vortex" of a public debate relating to in vitro fertilization. 139 N.C. App. at 786, 534 S.E.2d at 665. In reaching this conclusion, our Court discussed a number of examples of how one could insert himself into this public controversy. *Id.* In a statement referring to the controversy, the plaintiff stated that he "spent every spare moment trying to stop this lunacy [.]". The plaintiff wrote politicians, employed a personal lobbyist, and "procured the services of a public relations agent to enhance his public image." *Id.* at 786, 534 S.E.2d at 666. Additionally, the plaintiff provided a local newspaper with his side of the public controversy. Unlike the plaintiff in *Gaunt*, the record in this case is devoid of any evidence that Plaintiffs inserted themselves into this controversy. Accordingly, the trial court properly denied Defendants' motion for summary judgment as to the remaining Plaintiffs.

IV.

[5] Defendants next argue that the trial court erred by denying their motion for summary judgment as to all plaintiffs other than Dan Boyce because they cannot prove that the political advertisement was "of or concerning" them. We disagree.

As discussed in *Boyce I*, it is well established that "[i]n order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them defamatory." *Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979). Additionally, though an alleged defamatory statement may only make reference to a small group or class, any member of the referenced class may maintain a defamation action. See *Carter v. King*, 174 N.C. 549, 94 S.E. 4 (1917). Addressing this issue in *Boyce I* our Court determined that:

BOYCE & ISLEY, PLLC v. COOPER

[211 N.C. App. 469 (2011)]

[i]n the instant case, there is no dispute that the political advertisement reproduced in plaintiffs' complaint specifically identified the individual plaintiff R. Daniel Boyce. Defendants contend, however, that the reference to "Dan Boyce's law firm" in the advertisement does not identify the law firm of Boyce & Isley or its member attorneys. Thus, argue defendants, any defamatory statements contained in the advertisement did not concern plaintiffs other than R. Daniel Boyce. We disagree. The fact that the advertisement did not specifically name each present plaintiff does not bar their suit. *See Carter*, 174 N.C. at 552, 94 S.E. at 6. By claiming that "Dan Boyce's law firm" had committed unethical business practices, defendants maligned each attorney in the firm, of which there are only four. Moreover, we conclude that identification of the law firm of Boyce & Isley, PLLC, was readily ascertainable from the reference to "Dan Boyce's law firm." We therefore conclude that plaintiffs' complaint properly supported the fact that the defamatory statements were "of or concerning" plaintiffs.

Boyce I, 153 N.C. App. at 33, 568 S.E.2d at 900. As discussed earlier, our previous holding in *Boyce I* is controlling. There, assuming that the facts alleged in the complaint were true, our Court determined that the statements in the political advertisement were "of or concerning" Plaintiffs. Because our Court is tasked with making the same determination in this case, the question is settled here. *See N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 632 (1983) (holding that "once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case[,] and a subsequent panel has no authority to review the same question in the same case.).

V.

[6] In their final argument, Defendants contend that the trial court erroneously failed to find that there was no genuine issue of material fact with respect to Plaintiffs' unfair and deceptive trade practices cause of action. We disagree.

In order to establish an unfair and deceptive trade practices cause of action a plaintiff must show: "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71-72, 653 S.E.2d 393, 399 (2007). Our Supreme Court has held that "a libel *per se* of a type impeaching a party in its business

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

activities is an unfair or deceptive act in or affecting commerce in violation of [the unfair and deceptive trade practices act].” *Ellis v. Northern Star Co.*, 326 N.C. 219, 225-26, 388 S.E.2d 127, 131 (1990). Here, because Plaintiffs are able to forecast sufficient evidence to support a defamation cause of action, the trial court appropriately denied Defendants’ motion for summary judgment as to Plaintiffs’ unfair and deceptive trade practices action. Accordingly, we affirm the trial court’s order.

Affirmed.

Judges BRYANT and STEELMAN concur.

IN THE MATTER OF THE FORECLOSURE BY DAVID A. SIMPSON, P.C., SUBSTITUTE TRUSTEE, OF A DEED OF TRUST EXECUTED BY REX T. GILBERT, JR. AND DANIELA L. GILBERT, HUSBAND AND WIFE, DATED MAY 5, 2006 AND RECORDED ON MAY 10, 2006, IN BOOK 219 AT PAGE 53 OF THE HYDE COUNTY PUBLIC REGISTRY

No. COA10-361

(Filed 3 May 2011)

1. Mortgages and Deeds of Trust— foreclosure—debt— evidence of rescission—properly excluded

The trial court did not err in a foreclosure case by refusing to consider respondents’ defense that the debt petitioner sought to foreclose was not a valid debt. The trial court properly refused to consider respondents’ evidence of rescission because rescission is an equitable remedy which is not properly raised in a hearing held pursuant to N.C.G.S. § 45-21.16.

2. Mortgages and Deeds of Trust— foreclosure—petitioner not holder of note

The trial court erred in ordering the foreclosure of respondents’ house to proceed as petitioner did not prove that it was the holder of the note with the right to foreclose under the instrument as required by § 45-21.16(d)(i) and (iii).

Appeal by Respondents from order entered 18 August 2009 by Judge Marvin K. Blount, III in Hyde County Superior Court. Heard in the Court of Appeals 12 October 2010.

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

Katherine S. Parker-Lowe, for respondent-appellants.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and James R. White for petitioner-appellee.

HUNTER, JR., Robert N., Judge.

Respondents Rex T. Gilbert, Jr. and his wife Daniela L. Gilbert, appeal from the trial court's Order authorizing David A. Simpson, P.C., as Substitute Trustee, to proceed with foreclosure under a power of sale in the Deed of Trust recorded in Book 219 at Page 53 in the Hyde County Register of Deeds. We reverse.

I. Factual and Procedural History

On 5 May 2006, Respondent Rex T. Gilbert, Jr. executed an adjustable rate note ("the Note") to refinance an existing mortgage on his home. According to the terms of the Note, Mr. Gilbert promised to pay a principal amount of \$525,000.00 plus interest to First National Bank of Arizona. The Note was secured by a Deed of Trust, executed by Mr. Gilbert and his wife, Daniela L. Gilbert, on real property located at 134 West End Road, Ocracoke, North Carolina. The Deed of Trust identified First National Bank of Arizona as the lender and Matthew J. Ragaller of Casey, Grimsley & Ragaller, PLLC as the trustee.

The record reveals that, during 2008, Respondents ceased making payments on the Note and made an unsuccessful attempt to negotiate a modification of the loan. On 9 March 2009, a Substitution of Trustee was recorded in the Hyde County Register of Deeds, which purports to remove Matthew Ragaller as the trustee of the Deed of Trust and appoint his successor, David A. Simpson, P.C. ("Substitute Trustee"). The Substitution of Trustee identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 ("Petitioner") as the holder of the Note and the lien created by the Deed of Trust.

On 12 March 2009, the Substitute Trustee commenced this action by filing a Notice of Hearing on Foreclosure of Deed of Trust with the Hyde County Clerk of Superior Court pursuant to section 45-21.16 of our General Statutes. N.C. Gen. Stat. § 45-21.16 (2009). The Notice of Hearing stated, "the current holder of the foregoing Deed of Trust, and of the debt secured thereby, is: Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6."

In a letter dated 5 April 2009, Mr. Gilbert purported to exercise his right to rescind the loan transaction he entered into with the original

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

lender, First National Bank of Arizona, pursuant to the federal Truth in Lending Act, 15 U.S.C. § 1635. As justification for his purported rescission, Gilbert alleged that the Truth in Lending Disclosure Statement provided by First National Bank of Arizona failed to accurately provide all required material disclosures including, *inter alia*, the correct annual percentage rate and payment schedule. The Substitute Trustee responded with a letter from GMAC ResCap, in which it denied any material disclosure errors were made and refused to rescind the loan transaction.

The foreclosure hearing was held on 2 June 2009 before the Clerk of Superior Court of Hyde County. The Honorable Sharon G. Sadler entered an Order on 17 June 2009, permitting the Substitute Trustee to proceed with the foreclosure. In the Order, the Clerk specifically found, *inter alia*, that Petitioner was the holder of the Note and Deed of Trust that it sought to foreclose and the Note evidenced a valid debt owed by Mr. Gilbert. Respondents appealed the Order to superior court.

The matter came on for a *de novo* hearing on 18 August 2009 before the Honorable Marvin K. Blount, III, in Hyde County Superior Court. During the hearing, the trial court admitted into evidence a certified copy of the Note and the Deed of Trust and two affidavits attesting to the validity of Gilbert's indebtedness pursuant to the Note, and that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note. Additionally, Petitioner introduced the original Note and Allonge for the trial court's inspection.

Reviewing the record before this Court, the Allonge contains a series of indorsements evidencing the alleged assignments of the Note, as follows:

PAY TO THE ORDER OF:

First National Bank of Nevada

WITHOUT RECOURSE BY:

[Signature]

AMY HAWKINS, ASSISTANT VICE PRESIDENT

FIRST NATIONAL BANK OF ARIZONA

Pay to the order of:

RESIDENTIAL FUNDING CORPORATION

Without Recourse

FIRST NATIONAL BANK OF NEVADA

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

By: [Signature]

Deutsche Bank National Trust
Company, F/K/A Bankers Trust
Company of California, N.A.
as Custodian as Attorney in Fact
[Illegible Name and Title]

PAY TO THE ORDER OF

Deutsche Bank Trust Company Americas as Trustee
WITHOUT RECOURSE
Residential Funding Corporation

BY [Signature]

Judy Faber, Vice President

Respondents made two arguments at the hearing. First, Respondents argued that the debt evidenced by the Note no longer existed, as Mr. Gilbert had rescinded the transaction for the loan with First National Bank of Arizona. Petitioner objected to Respondents' rescission argument as being a defense in equity and, as such, inadmissible in a proceeding held pursuant to N.C. Gen. Stat. § 45-21.16. The trial court agreed and refused to let Respondents' expert witness testify as to alleged material errors in the Truth in Lending Disclosure Statement, which Mr. Gilbert alleged permitted him the right to rescind the loan. Second, Respondents argued that Petitioner had not produced sufficient evidence to establish that Deutsche Bank Trust Company Americas as Trustee for Residential Accredited Loans, Inc. Series 2006-QA6 was the holder of the Note.

Based on the preceding evidence, the trial court entered an order on 18 August 2009 in which it found, *inter alia*: Mr. Gilbert executed the Note and, with his wife, executed a Deed of Trust in favor of First National Bank of Arizona, secured by the real property described in the Deed of Trust; a valid debt exists and is owed by Gilbert to Petitioner; Gilbert is in default under the Note and Deed of Trust; proper notice of the foreclosure hearing was given to all parties as required by N.C. Gen. Stat. § 45-21.16; Petitioner was the current holder of the Note and the Deed of Trust. The trial court concluded as a matter of law that the requirements of N.C. Gen. Stat. § 45-21.16 had been satisfied. Based on these findings and conclusion of law, the trial court authorized the Substitute Trustee to proceed with the foreclosure. Respondents timely entered notice of appeal.

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

II. Analysis

A party seeking permission from the clerk of court to proceed with a foreclosure pursuant to a power of sale contained in a deed of trust must prove the following statutory requirements: (1) the party seeking foreclosure is the holder of a valid debt, (2) default on the debt by the debtor, (3) the deed of trust provides the right to foreclose, (4) proper notice was given to those parties entitled to notice pursuant to section 45-21.16(b). N.C. Gen. Stat. § 45-21.16(d) (2009). The General Assembly added a fifth requirement, which expired 31 October 2010: “that the underlying mortgage debt is not a subprime loan,” or, if it is a subprime loan, “that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed[.]” *Id.* The role of the clerk of court is limited to making a determination on the matters specified by section 45-21.16(d). *See Mosler ex rel. Simon v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009). If the clerk’s order is appealed to superior court, that court’s *de novo* hearing is limited to making a determination on the same issues as the clerk of court. *See id.*

The trial court’s order authorizing the foreclosure to proceed was a final judgment of the superior court, therefore, this Court has jurisdiction to hear the instant appeal. N.C. Gen. Stat. § 7A-27(b) (2009). Our standard of review for this appeal, where the trial court sat without a jury, is “‘whether competent evidence exists to support the trial court’s findings of fact and whether the conclusions reached were proper in light of the findings.’” *In re Adams*, — N.C. App. —, —, 693 S.E.2d 705, 708 (2010) (quoting *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000)).

We note the trial court classified multiple conclusions of law as “findings of fact.” We have previously recognized “[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult.” *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Generally, “any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.” *Id.* (citations omitted). Any determination made by “‘logical reasoning from the evidentiary facts,’” however, “is more properly classified a finding of fact.” *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

necessary, before applying our standard of review. *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (citing *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675).

Looking to the trial court's Order, we conclude that the following "findings of fact" are determinations that required the application of legal principles and are more appropriately classified as conclusions of law: a valid debt exists and is owed to Deutsche Bank Trust Company Americas as Trustee for Residential Accredited Loans, Inc. Series 2006-QA6; proper notice was given to and received by all parties as required by N.C. Gen. Stat. § 45-21.16 and the Rules of Civil Procedure; Deutsche Bank Trust Company Americas as Trustee for Residential Accredited Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust. *See In re Watts*, 38 N.C. App. 90, 92, 247 S.E.2d 427, 428 (1978) (noting upon the appeal of a N.C. Gen. Stat. § 45-21.16 special proceeding the trial court's *conclusions of law* included the existence of a valid debt, the right to foreclose under the deed of trust, and proper notice to the mortgagors); *see also Connolly v. Potts*, 63 N.C. App. 547, 549, 306 S.E.2d 123, 124 (1983) (same). In light of this reclassification of the trial court's findings of fact and conclusions of law, we turn to the issues raised on appeal.

1. Rescission of the Loan Transaction

[1] Respondents raise several arguments alleging the trial court erred by refusing to consider their defense to the foreclosure action, that the debt Petitioner sought to foreclose was not a valid debt—a required element under the statute for foreclosure by power of sale. *See* N.C. Gen. Stat. § 45-21.16(d)(i) (requiring, *inter alia*, that the clerk of court must determine that a valid debt exists). Respondents contend the debt is not valid because Mr. Gilbert rescinded the transaction by which he obtained the loan from First National Bank of Arizona pursuant to the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, and the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.1-58. We conclude the trial court did not err.

The admissibility of evidence in the trial court is based upon that court's sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion. *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004). Here, we conclude the trial court properly refused to consider Respondents' evidence of rescission. Rescission under the TILA is an equitable remedy. *See Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 819 (4th Cir. 2007) ("[A]lthough the right to rescind [under the TILA] is

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

[statutory], it remains an equitable doctrine subject to equitable considerations.’ ” (quoting *Brown v. Nat’l Permanent Fed. Sav. & Loan Ass’n*, 683 F.2d 444, 447 (D.C. Cir. 1982)). While legal defenses to a foreclosure under a power of sale are properly raised in a hearing held pursuant to section 45-21.16, equitable defenses are not. *Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429. As we have previously stated, a hearing under section 45-21.16 is “not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief.” *Id.* A party seeking to raise an equitable defense may do so in a separate civil action brought in superior court under section 45-21.34. *Id.*; N.C. Gen. Stat. § 45-21.34 (2009) (stating that a party with a legal or equitable interest in the subject property may apply to a superior court judge to enjoin a sale of the property upon legal or equitable grounds). Accordingly, the trial court properly concluded Respondents’ argument that Mr. Gilbert had rescinded the loan transaction, invalidating the debt Petitioner sought to foreclose, was an equitable defense and not properly before the trial court. Respondents’ argument is without merit.¹

2. Evidence that Petitioner was the Owner and Holder of Mr. Gilbert’s Promissory Note

[2] Respondents also argue the trial court erred in ordering the foreclosure to proceed, as Petitioner did not prove that it was the holder of the Note with the right to foreclose under the instrument as required by section 45-21.16(d)(i) and (iii). We agree.

A “foreclosure under a power of sale is not favored in the law and its exercise will be watched with jealousy.” *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (citations and internal quotation marks omitted). That the party seeking to foreclose on a promissory note is the holder of said note is an essential element of the action and the debtor is “entitled to demand strict proof of this element.” *Liles v. Myers*, 38 N.C. App. 525, 528, 248 S.E.2d 385, 388 (1978).

1. During the pendency of this action, the Gilberts filed a separate action against Deutsche Bank Trust Company Americas, Residential Funding, LLC, GMAC Mortgage, LLC, and David A. Simpson, P.C. to litigate, *inter alia*, their TILA claim in Hyde County Superior Court. The defendants removed the action to federal court. See *Gilbert v. Deutsche Bank Trust Co. Americas*, slip op. at 1, 4:09-CV-181-D, 2010 WL 2696763 (E.D.N.C. July 7, 2010), *reconsideration denied*, 2010 WL 4320460 (E.D.N.C. Oct. 19, 2010). Because the Gilberts’ claim was filed more than three years after the loan transaction was completed, the federal trial court dismissed the action for failure to state a claim upon which relief could be granted. *Id.* at —, slip op. at 5.

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

For the trial court to find sufficient evidence that Petitioner is the holder of a valid debt in accordance with section 45-21.16(d), “this Court has determined that the following two questions must be answered in the affirmative: (1) ‘is there sufficient competent evidence of a valid debt?’; and (2) ‘is there sufficient competent evidence that [the party seeking to foreclose is] the holder[] of the notes [that evidence that debt]?’ ” *Adams*, — N.C. App. at —, 693 S.E.2d at 709 (quoting *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804-05 (1978)); see N.C. Gen. Stat. § 45-21.16(d) (2009) (in order for the foreclosure to proceed, the clerk of court must find, *inter alia*, the existence of a “valid debt of which *the party seeking to foreclose is the holder*,” and a “right to foreclose under the instrument” securing the debt) (emphasis added).

Establishing that a party is the holder of the note is essential to protect the debtor from the threat of multiple judgments on the same note.

If such proof were not required, the plaintiff could negotiate the instrument to a third party who would become a holder in due course, bring a suit upon the note in her own name and obtain a judgment in her favor. . . . Requiring proof that the plaintiff is the holder of the note at the time of her suit reduces the possibility of such an inequitable occurrence.

Liles, 38 N.C. App. at 527, 248 S.E.2d at 387.

We have previously determined that the definition of “holder” under the Uniform Commercial Code (“UCC”), as adopted by North Carolina, controls the meaning of the term as it used in section 45-21.16 of our General Statutes for foreclosure actions under a power of sale. See *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125; *Adams*, — N.C. App. at —, 693 S.E.2d at 709. Our General Statutes define the “holder” of an instrument as “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” N.C. Gen. Stat. § 25-1-201(b)(21) (2009); *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980). Furthermore, a “[p]erson” means an individual, corporation, business trust, estate, trust . . . or any other legal or commercial entity.” N.C. Gen. Stat. § 25-1-201(b)(27) (2009).

As addressed above, we conclude the trial court properly found that a valid debt existed. The remaining issue before this Court is whether there was competent evidence that Petitioner was the holder of the Note that evidences Mr. Gilbert’s debt.

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

In support of its argument that it provided competent evidence to support the trial court's findings, Petitioner first points to its production of the original Note with the Allonge at the *de novo* hearing, as well as its introduction into evidence true and accurate copies of the Note and Allonge. Petitioner asserts this evidence "plainly evidences the transfers" of the Note to Petitioner. We cannot agree.

Under the UCC, as adopted by North Carolina, "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." N.C. Gen. Stat. § 25-3-203(a) (2009). Production of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument, as demonstrated in *Connolly*, 63 N.C. App. at 551, 306 S.E.2d at 125, and *Smathers v. Smathers*, 34 N.C. App. 724, 726, 239 S.E.2d 637, 638 (1977) (holding that despite evidence of voluntary transfer of promissory notes and the plaintiff's possession thereof, the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank. "[T]he plaintiff testified to some of the circumstances under which she obtained possession of the notes, but the trial court made no findings of fact with respect thereto.")

In *Connolly*, determining who had possession of the note became the critical question for the foreclosure proceeding. 63 N.C. App. at 551, 306 S.E.2d at 125. Several years prior to the foreclosure proceedings at issue in *Connolly*, the petitioners obtained a loan from a bank and pledged as collateral a promissory note that was payable to the petitioners by assigning and delivering the note to the bank. *Id.* at 549, 306 S.E.2d at 124. After obtaining their loan, the petitioners sought to foreclose on the promissory note and deed of trust, which was in the bank's possession, but were denied at the special proceeding before the clerk of court. *Id.* at 548, 306 S.E.2d at 124. The petitioners appealed the decision to superior court. *Id.* During the *de novo* hearing, the petitioners testified their loan to the bank had been paid, but "they had left the [] note at the bank, for security purposes." *Id.* at 551, 306 S.E.2d at 125. The petitioners, however, "introduced the originals of the note and deed of trust" during the hearing. *Id.* The trial court found the bank was in possession of the note and concluded, as a matter of law, the petitioners were not the holders of the note at the institution of the foreclosure proceedings; the foreclosure was again denied. *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 124-25.

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

On appeal, this Court concluded that despite the fact that the party seeking foreclosure introduced the original note at the time of the *de novo* hearing, the trial court's findings of fact did not address whether the petitioners were in possession of the note at the time of the trial; the trial court's judgment was vacated and remanded. *Id.* at 551, 306 S.E.2d at 125-26.

Similarly, here, the trial court's findings of fact do not address who had possession of Mr. Gilbert's note at the time of the *de novo* hearing. Without a determination of who has physical possession of the Note, the trial court cannot determine, under the UCC, the entity that is the holder of the Note. *See* N.C. Gen. Stat. § 25-1-201(b)(21) (defining "holder" as "the person *in possession* of a negotiable instrument that is payable either to bearer or to an identified person that is the person *in possession*") (emphasis added); *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125 ("It is the fact of possession which is significant in determining whether a person is a holder, and the *absence of possession defeats that status.*") (emphasis added). Accordingly, the trial court's findings of fact do not support the conclusion of law that Petitioner is the holder of Mr. Gilbert's note.

Assuming *arguendo* that production of the Note was evidence of a transfer of the Note pursuant to the UCC and that Petitioner was in possession of the Note, this is not sufficient evidence that Petitioner is the "holder" of the Note. As discussed in detail below, the Note was not indorsed to Petitioner or to bearer, a prerequisite to confer upon Petitioner the status of holder under the UCC. *See* N.C. Gen. Stat. § 25-1-201(b)(21) (requiring that, to be a holder, a person must be in possession of the note payable to bearer or to the person in possession of the note). " '[M]ere possession' of a note by a party to whom the note has neither been indorsed nor made payable 'does not suffice to prove ownership or holder status.'" *Adams*, — N.C. App. at —, 693 S.E.2d at 710 (quoting *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 203, 271 S.E.2d at 57).

Petitioner acknowledges that following the signing of the Note by Mr. Gilbert, the Note was sequentially assigned to several entities, as indicated by the series of indorsements on the Allonge, reprinted above. Respondents argue these indorsements present two problems. First, Respondents state that Petitioner did not provide any evidence to establish that Deutsche Bank National Trust Company had the authority, as the attorney-in-fact for First National Bank of Nevada, to assign the Note to Residential Funding Corporation in the second assignment. Respondents make no argument—and cite no authority

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

to establish—that such evidence is needed. Therefore, we do not address the merits of this alleged error and deem it abandoned. *See* N.C. R. App. P. 28(6) (2011) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”)

Second, Respondents argue Petitioner has not offered sufficient evidence that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 was the holder of the Note and, thus, the party entitled to proceed with the foreclosure action. We agree.

Respondents note the third and final assignment on the Allonge was made to “Deutsche Bank Trust Company Americas as Trustee,” which is not the party asserting a security interest in Respondents’ property; this action was brought by Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6, the entity the trial court found to be the owner and holder of the Note. Section 3-110 of the UCC, as codified in our General Statutes, states in pertinent part:

For the purpose of determining the *holder* of an instrument, the following rules apply:

....

(2) If an instrument is payable to (i) a trust, an estate, *or a person described as trustee* or representative of a trust or estate, the instrument is *payable to the trustee*, the representative, or a successor of either, whether or not the beneficiary or estate is also named

N.C. Gen. Stat. § 25-3-110(c) (2009) (emphasis added). Additionally, the official comments to this section of the UCC state, in part, “This provision merely determines who can deal with an instrument as a holder. It does not determine ownership of the instrument or its proceeds.” *Id.* § 25-3-110, Official Comment 3.

In the present case, the Note is clearly indorsed “PAY TO THE ORDER OF Deutsche Bank Trust Company Americas as Trustee.” Thus, pursuant to section 25-3-110(c)(2), the Note is payable to Deutsche Bank Trust Company Americas as Trustee. *See Id.* Because the indorsement does not identify Petitioner and is not indorsed in blank or to bearer, it cannot be competent evidence that Petitioner is the holder of the Note. *See* N.C. Gen. Stat. § 25-1-201(b)(21) (defining “holder” as “[t]he person in possession of a negotiable instrument

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

that is payable either to bearer or to an identified person that is the person in possession”); *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 204, 271 S.E.2d at 57 (concluding that where the defendants produced a copy of the note indorsed to an entity other than the plaintiff, the “defendants established that plaintiff was not the owner or holder of the note”).

In addition to the Note and Allonge, Petitioner points to two affidavits provided by two GMAC Mortgage employees as further evidence that the trial court’s findings are based on sufficient competent evidence. Again, we disagree.

The first affidavit is an Affidavit of Indebtedness by Jeffrey Stephan (“Stephan”).² In his affidavit, Stephan averred, *inter alia*, he was a limited signing officer for GMAC Mortgage, the sub-servicer of Mr. Gilbert’s loan, and as such, was “familiar with the books and records of [GMAC Mortgage], specifically payments made pursuant to the Note and Deed of Trust.” Accordingly, Stephan testified as to the principal amount of Mr. Gilbert’s loan and to his history of loan payments. Stephan further testified that after the Note and Deed of Trust were executed they were “delivered” to the original lender, First National Bank of Arizona; the original lender then “assigned and transferred all of its right, title and interest” to First National Bank of Nevada, which, in turn, assigned all its rights, title, and interest in the instruments to Residential Funding Corporation. The final assignment to which Stephan averred is an assignment and securitization of the Note and Deed of Trust from Residential Funding Corporation to “Deutsche Bank Trust Company Americas as Trustee.” Stephan then makes the conclusory statement, “Deutsche Bank Trust Company Americas as Trustee for Residential Accredited Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust described herein.”

2. This Court finds troubling that GMAC Mortgage, LLC was recently found to have submitted a false affidavit by Signing Officer Jeffrey Stephan in a motion for summary judgment against a mortgagor in the United States District Court of Maine. Judge John H. Rich, III concluded that GMAC Mortgage submitted Stephan’s false affidavit in bad faith and levied sanctions against GMAC Mortgage, stating:

[T]he attestation to the Stephan affidavit was not, in fact, true; that is, Stephan did not know personally that all of the facts stated in the affidavit were true. . . . GMAC [Mortgage] was on notice that the conduct at issue here was unacceptable to the courts, which rely on sworn affidavits as admissible evidence in connection with motions for summary judgment. In 2006, an identical jurat signed under identical circumstances resulted in the imposition of sanctions against GMAC [Mortgage] in Florida.

James v. U.S. Bank Nat. Ass’n, 272 F.R.D. 47, 48 (D. Me. 2011).

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

Whether Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of the Note and Deed of Trust is a legal conclusion that is to be determined by a court of law on the basis of factual allegations. As such, we disregard Stephan's conclusion as to the identity of the "owner and holder" of the instruments. *See Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) ("Statements in affidavits as to opinion, belief, or conclusions of law are of no effect." (quoting 3 Am. Jur. 2d, *Affidavits* § 13 (2002))); *see also Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, — N.C. App. —, — n.2, — S.E.2d —, — n.2, slip op. at 12 n.2, No. 09-1451 (Feb. 15, 2011) (rejecting a party's contention that this Court must accept as true all statements found in the affidavits in the record, stating, "our standard of review does not require that we accept a witness' characterization of what 'the facts' mean"). While Stephan referred to a Pooling and Servicing Agreement ("PSA") that allegedly governs the securitization of the Note to Deutsche Bank Trust Company Americas as Trustee, the PSA was not included in the record and will not be considered by this Court. *See* N.C. R. App. P. 9(a) (2011) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.") The record is void of any evidence the Note was assigned and securitized to a trust.

We also note that Stephan alleged no facts as to who possesses Mr. Gilbert's note, other than his averment that the Note was "delivered" to the original lender, First National Bank of Arizona. Stephan referred to a statement made by counsel for GMAC Mortgage that the original Note "would be brought to the foreclosure hearing," but he did not provide any facts from which the trial court could determine who has possession of the Note. As demonstrated by *Connolly*, discussed above, production of a note at trial is not conclusive evidence of possession. 63 N.C. App. at 551, 306 S.E.2d at 125. Thus, we conclude Stephan's affidavit is not competent evidence to support the trial court's conclusion that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of Mr. Gilbert's note.

Petitioner also provided the affidavit of Scott Zeitz ("Zeitz"), who alleged in his affidavit to be a litigation analyst for GMAC Mortgage. Zeitz's basis for his affidavit testimony is that he works with "the documents that relate to account histories and account balances of par-

IN RE FORECLOSURE OF GILBERT

[211 N.C. App. 483 (2011)]

ticular loans” and that he is familiar with Mr. Gilbert’s account. Accordingly, Zeitz testified to the details of Mr. Gilbert’s loan and the terms of the Note. Zeitz’s affidavit, substantially similar to the affidavit of Jeffrey Stephan, also averred to the transfer of the Note and Deed of Trust through the series of entities indicated on the Allonge, stating in part:

Residential Funding Corporation sold, assigned and transferred all of its right, title and interest in and to the Note and Deed of Trust to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. *This is reflected on the Allonge to the Note, a true and accurate copy of which is attached* and incorporated hereto as EXHIBIT 5. (Emphasis added.)

This statement is factually incorrect; the Allonge in the record contains no indorsement to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. Zeitz further stated that “Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust.” This statement is a legal conclusion postured as an allegation of fact and as such will not be considered by this Court. *See Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 349.

Unlike Jeffrey Stephan, Zeitz stated that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 “has possession of the original Note and Deed of Trust.” We note, however, that “[w]hen an affiant makes a conclusion of fact, it must appear that the affiant had an opportunity to observe and did observe matters about which he or she testifies.” *Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 348-49 (quoting 3 Am. Jur. 2d *Affidavits* § 13) (internal quotation marks omitted). Moreover,

[t]he personal knowledge of facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed that such does not exist.

Id. at 622-23, 596 S.E.2d at 349 (quoting 3 Am. Jur. 2d *Affidavits* § 14, *cited with approval in Currituck Associates Residential P’ship v. Hollowell*, 170 N.C. App. 399, 403-04, 612 S.E.2d 386, 389 (2005)). Thus, while Zeitz concluded as fact that Deutsche Bank Trust

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 has possession of the Note, his affidavit provides no basis upon which we can conclude he had personal knowledge of this alleged fact. Because of these deficiencies, we conclude that neither the affidavit of Jeffrey Stephan nor the affidavit of Scott Zeitz is competent evidence to support the trial court's finding that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of Mr. Gilbert's note.

III. Conclusion

We conclude the record is lacking of competent evidence sufficient to support that Petitioner is the owner and holder of Mr. Gilbert's note and deed of trust. The trial court erred in permitting the Substitute Trustee to proceed with foreclosure proceedings and its order is

Reversed.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. ROBERT FRANK DEBIASE

No. COA10-113

(Filed 3 May 2011)

Homicide— second-degree murder—erroneous failure to instruct on lesser-included offense—involuntary manslaughter

The trial court erred in a second-degree murder case by failing to instruct the jury on the lesser-included offense of involuntary manslaughter, and defendant was entitled to a new trial. There was a reasonable possibility that the jury might have concluded that defendant acted without intent to kill or inflict serious bodily injury.

Appeal by defendant from judgment entered 8 May 2009 by Judge Alan Z. Thornburg in Transylvania County Superior Court. Heard in the Court of Appeals 14 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Duncan B. McCormick, for Defendant.

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

ERVIN, Judge.

Defendant Robert Frank Debiase appeals from a judgment sentencing him to a minimum term of 170 months and a maximum term of 213 months imprisonment in the custody of the North Carolina Department of Correction based on his conviction for second degree murder. On appeal, Defendant contends that he is entitled to a new trial because the trial court erroneously failed to instruct the jury on the lesser-included offense of involuntary manslaughter. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's contention has merit, so that he is entitled to a new trial.

I. Factual BackgroundA. Substantive Facts1. Background and Preliminary Information

On 26 May 2007, Defendant, Christopher Lien and approximately twenty to thirty other people attended a bonfire party hosted by Matt Allender. At some point during the party, Defendant approached Mr. Lien's girlfriend, Concetta Cafaro, and asked if she wanted to consume OxyContin with him. Defendant's suggestion upset Mr. Lien, resulting in an argument between the two men, who did not know each other. Eventually, the argument degenerated into a fight, during which Mr. Lien sustained a "gaping incise wound [to] his neck" resulting in his death.

The wound that killed Mr. Lien was eleven and one-half inches long, three inches wide, and, at its deepest point, penetrated two inches into the soft tissue of Mr. Lien's neck. Others described the wound as "a large laceration from right back behind the neck here to running the V in the sternum," a "[v]ery large laceration with a large hole" on the "left side of his throat" that was "significantly deep," "a cut from one part of the face all the way down into the chest," and "a gaping wound on his neck on the left side of his neck." According to Dr. Cynthia Gardner, the forensic pathologist who autopsied Mr. Lien's body, this wound severed Mr. Lien's carotid artery, jugular vein, and trachea, causing massive blood loss and difficulty in breathing. In addition, Mr. Lien sustained a "superficial" or "shallow" "incise wound on [his] left ear, basically on the earlobe." Dr. Gardner testified that both injuries could have been caused by a broken, but not an unbroken, beer bottle. In order for the fatal injury to have resulted from a fall, Dr. Gardner believed that it would have been necessary

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

for Mr. Lien to have landed on an object that was at least eleven inches in length. Dr. Gardner opined that the injury that led to Mr. Lien's death could not have resulted from rolling around in an area strewn with broken bottles. However, Dr. Gardner did conclude that the distinct nature of the two wounds indicated that they were "caused by a separate action." Finally, Mr. Lien had abrasions on his wrist and knees and post-mortem first and second degree burns to his face, neck, torso, and arms.

A number of witnesses, most of whom admitted to having consumed various quantities of alcohol¹, provided contradictory accounts of the altercation between Defendant and Mr. Lien. Several of them commented on the fast-paced nature of the events that occurred at the time of Mr. Lien's death, stating at various points during trial that the entire incident lasted only ten seconds, that there was time for only one blow, that "[i]t was a really fast ordeal," and "it happened so quick."

2. Confrontation at the Campfire

The testimony of the eyewitnesses concerning the altercation between Defendant and Mr. Lien can be summarized as follows:

a. State's Evidence

According to Ian Armstrong, Defendant hit Mr. Lien with a beer bottle that he held in his right hand. After the bottle broke, the two combatants grappled with each other, at which point both of them fell into the fire, with Defendant on top of Mr. Lien. A group of partygoers removed Defendant from the fire and tried to extricate Mr. Lien from the flames as well. As the bystanders assisted Defendant, he was attempting to get off of Mr. Lien and out of the fire on his own. After Mr. Lien was removed from the fire, Defendant realized how badly Mr. Lien had been injured, told someone to "call 911," removed his shirt, and said that it should be used to "apply pressure to [Mr. Lien's] neck." In response, Defendant was told to "just leave [Mr. Lien] alone." Mr. Armstrong only saw a single blow, did not see anyone making any stabbing motions, and did not see any blood before the two men fell into the fire.

1. Both Defendant and Mr. Lien had consumed impairing substances on the evening in question. According to the autopsy report, Mr. Lien had a blood alcohol content of .18. Defendant admitted having consumed three beers and a shot of Jagermeister before arriving at the party, to drinking at least half a beer after his arrival, and to having a prescription bottle of Hydrocodone in his possession. Ms. Cafaro described Defendant as a "little speedy" and as acting as if he might have been using cocaine, although she did not see him consume any such substance.

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

Ms. Cafaro testified that, following an exchange of words between Defendant and Mr. Lien, Defendant was standing beside a car and holding a beer bottle. After Defendant and Mr. Lien started pushing each other, Defendant raised a beer bottle over his head, “used” the bottle on Mr. Lien’s head “a couple times,” and, subsequently, jabbed Mr. Lien “multiple times” with the bottle. Ms. Cafaro did not see the bottle break or know how it broke; however, when she looked at Mr. Lien, she realized that he had been cut. According to Ms. Cafaro, Defendant and Mr. Lien ceased fighting for “a moment,” at which point Mr. Lien walked away holding his throat. However, Defendant “came behind, pushed him, and he fell on top of the fire.” Once in the fire, Defendant “was like on top of [Mr. Lien] and was hitting him. He got like two hits in.”

Shane Mooney said that, when he saw Defendant and Mr. Lien yelling at each other, he tried to separate the two men. After Mr. Mooney and other persons present parted Mr. Lien and Defendant, they ran toward each other. As they came together, Defendant “came down on [Mr. Lien’s] head with a beer bottle,” which broke on impact. Mr. Mooney thought that he heard the bottle break when Defendant hit Mr. Lien with it. According to Mr. Mooney, “it appeared that [Defendant] still had [the bottle] in his hand as he was punching [Mr. Lien] from underneath as well. And then they kind of locked up together, and [Mr. Lien] kind of went down, in which point [Defendant] wrapped him up and threw him into the fire on his back and proceeded to hit him in the face with his fist.” Although Mr. Mooney did not see any blood or other signs of injury immediately after Defendant hit Mr. Lien with the bottle, it was fairly dark at the time that the blow was struck. At that point, Mr. Mooney pulled Defendant off of Mr. Lien. As Mr. Mooney pulled Mr. Lien out of the fire, he realized that he had blood on his hands.

Charles Pulliam stated that he did not remember any exchange of words between Defendant and Mr. Lien. According to Mr. Pulliam, Defendant hit Mr. Lien with the bottle; however, he did not know if the bottle was broken before it hit Mr. Lien. After the bottle struck Mr. Lien’s cheek, Mr. Pulliam saw blood coming from the gash.

b. Defendant’s Evidence

Matthew Allender did not see Mr. Lien and Defendant argue or understand that they had exchanged harsh words. After hearing a bottle break, Mr. Allender turned to see what was happening, at which point he saw Mr. Lien and Defendant struggling. Both men

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

grabbed each other, and then fell into the fire. Mr. Allender did not see a bottle, never saw any stabbing or jabbing, and did not see any blood until Mr. Lien and Defendant fell.

Nikki Sentelle Denson turned when she heard a disturbance and observed Mr. Lien's body in the fire. Ms. Denson did not see any pushing or shoving and never saw Defendant strike Mr. Lien after Mr. Lien rolled through the fire. Similarly, Forrest Hensley did not see Defendant strike Mr. Lien. Instead, as the two men wrestled, he observed them fall into the fire.

Je'Hean Christopher Sharpe testified that, until Defendant asked Ms. Cafaro if she wanted to ingest drugs with him, everything was fine. At that point, Defendant and Mr. Lien began to have words with each other. As the argument escalated, Mr. Sharpe attempted to get Defendant to leave. At the time that Defendant began to depart, something caused both Defendant and Mr. Lien to get angrier. After Mr. Lien threatened Defendant, he came toward Defendant, who turned and hit Mr. Lien on the head with a beer bottle. Although Mr. Sharpe "felt the beer and the glass" when the bottle struck Mr. Lien's head, he did not see the bottle after Defendant hit Mr. Lien with it or see any stabbing motions. Defendant jumped out of the fire immediately after the two men fell in, but the same was not true of Mr. Lien. After Mr. Mooney pulled Mr. Lien out of the fire, Mr. Sharpe could see a lot of blood.

Euriel Turner testified that, after Defendant spoke with Ms. Cafaro, he saw Mr. Lien confront Defendant and punch Defendant in the chest. After that happened, Defendant threw up his hands and started to walk away. Although Mr. Turner attempted to calm Mr. Lien down, Mr. Lien pushed Mr. Turner aside and charged Defendant, who struck Mr. Lien on the side of the neck with a beer bottle. As Mr. Lien and Defendant wrestled, they tripped and fell into the fire, with Mr. Lien facing in a downwards direction.

Defendant, who testified on his own behalf, said that Mr. Lien became angry after Defendant offered Hydrocodone to Ms. Cafaro. After Mr. Lien pushed Defendant, three men grabbed Mr. Lien. When Defendant and Mr. Sharpe turned around, Mr. Lien escaped from the group that was holding him and charged at Defendant, who had two beers in his hand. At the time that Mr. Lien charged, Defendant turned, backed up a bit, swung the bottle, and hit Mr. Lien on the top of the head, at which point the bottle shattered. After backing off a few feet, Mr. Lien charged Defendant again. Defendant dropped the beer bottles, grabbed Mr. Lien, and struggled with him for a brief

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

interval before the two of them fell into the fire. Defendant testified that he reacted instinctively when he saw that Mr. Lien was charging at him by “turn[ing] around, . . . back[ing] up, and [swinging] the bottle,” which “hit [Mr. Lien] over the top of the head.”

Q.: Did you intend to kill Chris Lien?

A.: Not at all.

Q.: Well, did you intend to inflict serious injury on the person of Chris Lien?

A.: No, sir.

Q.: Why did you hit him with the beer bottle?

A.: I honestly—it was a reaction almost, it was a flash kind of just—he come toward me; and I was kind of being held; and I was afraid. I was afraid that he was going to come and hurt me.

When he realized how badly Mr. Lien had been hurt, Defendant “went down to him” and apologized. Defendant claimed that he “panicked and [was] in shock,” explaining that he “didn’t really know what to do” and that, since “people seemed mad,” he “kind of just slowly turned [his] head down and walked away.”

3. Events Following the Altercation

After the altercation, Defendant called his girlfriend to request that she pick him up and left the scene before law enforcement officers and emergency responders arrived. At first, Defendant attempted to check into a hotel in the hopes of “just get[ting] away.” Ultimately, however, he went to his father’s residence before turning himself in and making a statement to investigating officers. At his father’s house, Defendant explained that he had been attacked at a party and reacted by hitting Mr. Lien on the head with a bottle.

During an interview with Special Agent Tom Ammons of the State Bureau of Investigation, Defendant indicated that Mr. Lien became irritated when he offered some Hydrocodone to Ms. Cafaro. After Mr. Lien pushed Defendant, a number of people intervened to separate them. At that point, Defendant was holding a full beer bottle by the neck. Defendant told Special Agent Ammons that “he knew that he would hit [Mr. Lien] with the beer bottle if [Mr. Lien] made [it] through the people.” When Mr. Lien, who was not armed, came between the others and neared Defendant, Defendant “hit [Mr. Lien] with the beer bottle on the top back portion of his head.” Defendant

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

put Mr. Lien in a headlock, the two men struggled, and both of them went to the ground, rolling over and through the campfire before they separated. After the fight ended, Defendant realized how badly Mr. Lien's neck had been cut.

B. Procedural History

On 26 November 2007, the Transylvania County grand jury returned a bill of indictment charging Defendant with second degree murder. The charge against Defendant came on for trial before the trial court and a jury at the 27 April 2009 Criminal Session of Transylvania County Superior Court. After the close of all of the evidence, the trial court submitted the issue of whether Defendant was guilty of second degree murder, guilty of voluntary manslaughter or not guilty for the jury's consideration. On 8 May 2009, the jury returned a verdict convicting Defendant of second degree murder. At the ensuing sentencing hearing, the trial court determined that Defendant had four prior record points and should be sentenced as a Level II offender. Based upon these findings, the trial court entered a judgment sentencing Defendant to a minimum term of 170 months and a maximum term of 213 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II Legal Analysis

On appeal, Defendant argues that the trial court erred by refusing to instruct the jury that it was entitled to return a verdict convicting Defendant of the lesser-included offense of involuntary manslaughter.² Due to the fact that the evidence, when taken in the light most favorable to Defendant, would have reasonably supported a jury verdict convicting Defendant of involuntary manslaughter, we conclude that Defendant's argument has merit.

This Court reviews a defendant's challenge to a trial court's decision to instruct the jury on the issue of the defendant's guilt of a

2. At the jury instruction conference, Defendant requested that the trial court instruct the jury concerning the issue of Defendant's guilt of involuntary manslaughter. The trial court denied Defendant's request. At the conclusion of the trial court's instructions, Defendant unsuccessfully renewed his request for an involuntary manslaughter instruction. As a result, we conclude that Defendant adequately preserved this issue for appellate review. N.C.R. App. P. 10(a)(2) (stating that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]")

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

lesser included offense, such as involuntary manslaughter, on a *de novo* basis. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (stating that “[a]ssignments of error challenging the trial court’s decisions regarding jury instructions are reviewed *de novo*”) (citing *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146-47 (1992) and *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990)). “[A] judge presiding over a jury trial must instruct the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense.” *State v. McConnaughey*, 66 N.C. App. 92, 95, 311 S.E.2d 26, 28 (1984) (citing *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983) and *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *disapproved on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). In determining whether the evidence is sufficient to support the submission of the issue of a defendant’s guilt of a lesser included offense to the jury, “courts must consider the evidence in the light most favorable to [the] defendant.” *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277 (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)), *disc. review denied*, 353 N.C. 453, 548 S.E.2d 529 (2001). However, “[i]f the State’s evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant’s denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense.” *State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (citation omitted), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100, 121 S. Ct. 151 (2000).

The evidence, when taken in the light most favorable to Defendant, tended to show that Defendant did not intend to kill or seriously injure Mr. Lien; that Mr. Lien became angry at Defendant after Defendant offered drugs to his girlfriend, Ms. Carfaro; that, after an initial incident during which Mr. Lien either punched or shoved Defendant, others separated the two men; that Mr. Lien subsequently charged Defendant, who struck Mr. Lien on the top of the head or the side of the neck with a beer bottle; that the beer bottle shattered on impact; that Defendant and Mr. Lien struggled and fell into the fire; and that Defendant did not stab Mr. Lien. As a result of the fact that the undisputed evidence establishes that Mr. Lien’s death resulted from a large laceration to the neck, the evidence, taken in the light most favorable to Defendant, might reasonably be understood as tending to suggest that the fatal wound was unintentionally inflicted either at the time that the bottle shattered or when Defendant and Mr.

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

Lien were rolling around on the ground rather than as the result of a decision by Defendant to deliberately stab Mr. Lien with the broken bottle.³ We believe that this evidence, considered in the light most favorable to Defendant, would permit a reasonable juror to find Defendant guilty of involuntary manslaughter.

Involuntary manslaughter, which is “a lesser included offense of second degree murder[.]” *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989), is the “unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.” *State v. Drew*, 162 N.C. App. 482, 685, 592 S.E.2d 27, 29 (quoting *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (citation omitted)), *disc. review denied*, 358 N.C. 735, 601 S.E.2d 867 (2004). The offense “may also be defined as the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.” *Powell*, 335 N.C. at 767, 446 S.E.2d at 29. “Involuntary manslaughter is distinguished from murder . . . by ‘the absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury.’” *Drew*, 162 N.C. App. at 686, 592 S.E.2d at 29 (quoting *State v. Greene*, 314 N.C. 649, 651, 336 S.E.2d 87, 89 (1985)).

As used in the criminal law, “culpable negligence . . . requires more than the negligence necessary to sustain a recovery in tort . . . [and] must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others.” *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977). An involuntary manslaughter conviction can be based upon evidence tending to show the occurrence of an “unintentional homicide resulting from the reckless use of a deadly weapon under circumstances not evidencing a heart devoid of a sense of social duty.” *State v. Fleming*, 296 N.C. 559, 564, 251 S.E.2d 430, 433 (1979). “[W]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a

3. In the interest of simplicity, we will assume, for the remainder of this opinion, that Mr. Lien’s death resulted from a stab wound inflicted at the time that Defendant hit him in the head with the bottle. In the event that the jury concluded that the fatal wound occurred when Defendant and Mr. Lien were rolling around on the ground, such a determination might also support an involuntary manslaughter conviction. However, we need not examine that issue in detail, given that the evidence tending to suggest that the fatal wound was inflicted when Defendant struck Mr. Lien in the head with the bottle provides ample basis for the submission of the issue of Defendant’s guilt of involuntary manslaughter to the jury.

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

specific intent to kill, it is . . . accomplished by means of some intentional act[.]” since, “without some intentional act in the chain of causation leading to death[.] there can be no criminal responsibility[.]” so that “[d]eath under such circumstances would be the result of accident or misadventure.” *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E.2d 905, 918 (1978) (citations omitted); see also *State v. Brewer*, 325 N.C. 550, 575-76, 386 S.E.2d 569, 583-84 (1989), (stating that a lack of evidence of an unintentional shooting is not determinative on the question of whether or not the trial court erred by failing to submit the issue of the defendant’s guilt of involuntary manslaughter to the jury), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541, 110 S. Ct. 2215 (1990).⁴ As a result, despite the fact that Defendant acted intentionally at the time that he struck Mr. Lien with the bottle, the evidence contained in the present record is susceptible to the interpretation that, at the time that he struck Mr. Lien, Defendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to Mr. Lien’s neck. Death resulting from such a series of events would, under the previous decisions of this Court and the Supreme Court, permit an involuntary manslaughter conviction.

A series of decisions by this Court and the Supreme Court have clearly stated that, in similar situations, the record evidence supported the submission of the issue of the defendant’s guilt of involuntary manslaughter to the jury. For example, the Supreme Court has held that a trial court erred by refusing to deliver an involuntary manslaughter instruction because “defendant’s evidence, if believed, could support a verdict of involuntary manslaughter on the theory that the killing was the result of his reckless, but unintentional use of the butcher knife[.]” when he intentionally carried and used such a knife during the course of a struggle with the deceased, but claimed that “the actual infliction of the fatal wound . . . was not intentional.” *State v. Buck*, 310 N.C. 602, 606-07, 313 S.E.2d 550, 553 (1984). Similarly, the Supreme Court has held that the record supported the submission of an involuntary manslaughter issue to the jury on the basis of the defendant’s testimony that he picked up a knife on impulse and accidentally pushed the knife into the deceased during a struggle. *Fleming*, 296 N.C. at 563-64, 251 S.E.2d at 432-33. In explaining this determination, the Supreme Court stated that:

4. For this reason, the State’s reliance upon Defendant’s admission that he intentionally hit Mr. Lien with the bottle is not sufficient, standing alone, to support upholding the trial court’s refusal to submit an involuntary manslaughter issue to the jury.

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

[Defendant] says the cutting was not intentional. If believed, his testimony would support a finding of . . . an unintentional homicide resulting from the reckless use of a deadly weapon under circumstances not evidencing a heart devoid of a sense of social duty. In the setting created by such testimony, *and with credibility a matter for the jury*, it was not error for the court to submit involuntary manslaughter with appropriate instructions[.]

Id. This Court addressed a similar issue in *Drew*, where we reasoned that:

In *State v. Daniels*, 87 N.C. App. 287, 360 S.E.2d 470 (1987), as here, the defendant argued that the trial court erred in submitting involuntary manslaughter as a possible verdict when the defendant had stabbed the victim. In *Daniels*, the defendant, who was in a fight with the victim, “stuck at him, trying to get him away from [her]”, but “she did not intend to either stab or hurt [the victim.]” The Court also observed that the defendant had claimed, in her statements, that she did not mean to hurt the victim. This Court held that “[e]vidence indicating that [the victim’s] death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so clearly meets [the] requirement” that the killing was the result of an act done in a culpable or criminally negligent way.

The evidence in this case is comparable. There were no eyewitnesses to the actual stabbing; the sole evidence of what occurred in the bathroom is found in defendant’s statements to the Sheriff’s Department. From those statements, a jury could find that defendant, who had been told that no one was in the house, was surprised in the bathroom by a man whom he did not immediately recognize; that the intruder lunged or swung at him; that he immediately swung back holding the knife; and that he ran away out of fear. The jury could also find, based on defendant’s statements and the testimony of the officers, that defendant did not know that he had stabbed [the victim] and that he did not intend to kill him. Officers confirmed that defendant was “hysterical” and “very upset” when they found him.

From this evidence, the jury could have further concluded that defendant panicked after discovering [the victim] and either (1) intended to strike at [the victim] to keep him away, but did not intend to kill or seriously injure him; or (2) simply reacted instinctively without any intent to strike [the victim] at all. Either

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

scenario would support a verdict of involuntary manslaughter under *Daniels*.

Drew, 162 N.C. App. at 686-87, 592 S.E.2d at 30 (internal citations omitted). Taken together, *Buck*, *Fleming*, *Drew*, and *Daniels* clearly establish that evidence tending to show the occurrence of a killing caused by the negligent or reckless use of a deadly weapon without any intent to inflict death or serious injury is sufficient to support an involuntary manslaughter conviction. *Drew*, 162 N.C. App. at 686, 592 S.E.2d at 29 (stating that, “[a]lthough the crime in this case involved a deadly weapon—a knife—defendant may still be found guilty of involuntary manslaughter if he acted without any intent to kill or inflict serious injury”); *Daniels*, 87 N.C. App. at 289, 360 S.E.2d at 471 (stating that “[e]vidence indicating that [the deceased’s] death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so” suffices to support a finding that the defendant is guilty of involuntary manslaughter); *State v. Graham*, 38 N.C. App. 86, 89, 247 S.E.2d 300, 302-03 (1978) (stating that the defendant’s testimony to the effect that “[h]e fired two shots, the first aimed at no one but intended to break up a fight, and the second, accidentally when ‘he threw up the gun and it went off,’ ” described an unintentional killing and required the submission of the issue of the defendant’s guilt of involuntary manslaughter to the jury). Although Defendant admitted that he intended to hit Mr. Lien with an intact beer bottle in his trial testimony, he denied that he intended to kill or seriously injury him. Such evidence, if believed is, under *Buck*, *Fleming*, *Drew*, and *Daniels*, sufficient to support a finding that Mr. Lien’s death resulted from the Defendant’s reckless use of the bottle and would support a jury verdict finding Defendant guilty of involuntary manslaughter.

The facts at issue here are easily distinguishable from those held insufficient to support the submission of an involuntary manslaughter instruction. In such cases, “the evidence show[ed] that the defendants deliberately engaged in an act likely to result in death or serious injury [and,] [o]ther than the defendants’ assertions that they had not meant to kill, there was no evidence that the killings were accidental.” *McConnaughey*, 66 N.C. App. at 97, 311 S.E.2d at 30; *see also State v. Fisher*, 318 N.C. 512, 525-26, 350 S.E.2d 334, 342 (1986) (holding that the evidence did not support the submission of the issue of the defendant’s guilt of involuntary manslaughter to the jury when “the defendant admit[t]ed that he knowingly slashed and stabbed the deceased with a hunting knife[,]” since “[t]here can be no claim of accidental injury where one knowingly and willingly uses a knife to slash and

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

stab his victim” and since “[f]atal consequences were not improbable in light of the defendant’s use of his hunting knife in such a manner”); *State v. Young*, 196 N.C. App. 691, 698, 675 S.E.2d 704, 709 (2009) (holding that the submission of the issue of Defendant’s guilt of involuntary manslaughter to the jury was not required where “the evidence presented at trial, taken in the light most favorable to the Defendant, indicates that either Defendant intentionally fired the shot that killed the victim or Defendant aided and abetted the commission of an intentional crime”). Here, however, the record contains evidence other than a mere claim of lack of intent tending to support Defendant’s contention that he did not intend to kill or seriously injure Mr. Lien, such as the evidence tending to show that Defendant struck Mr. Lien with the bottle when Mr. Lien rushed at him, that Defendant only struck Mr. Lien with the bottle on one occasion, and that Defendant did not, contrary to testimony presented by certain of the State’s witnesses, stab Mr. Lien with the broken beer bottle during the resulting melee. As a result, the evidence tending to support a conclusion that a reasonable jury could convict Defendant of involuntary manslaughter consists of much more than Defendant’s unsupported claim that he did not intend to kill or seriously injure Mr. Lien.

In attempting to defend the trial court’s refusal to submit an involuntary manslaughter issue to the jury, the State relies on Defendant’s admission that he intentionally hit Mr. Lien on the head with a beer bottle. As a result of its belief that the beer bottle in question was a deadly weapon as a matter of law, the State argues that Defendant is presumed, under well-established North Carolina law, to have acted with malice, thereby validating the trial court’s refusal to allow the jury to consider the issue of Defendant’s guilt of involuntary manslaughter. We do not find this argument persuasive.

Although the State is certainly correct in noting that “[t]he intentional use of a deadly weapon [creates] a presumption . . . [of] malice[.]” *State v. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983) (citation omitted), the rule “that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive, irrebuttable presumption,” so that, if the defendant adduces evidence or relies on a portion of the State’s evidence “raising an issue on the existence of malice and unlawfulness,” the presumption “disappears altogether, leaving only a permissible inference which the jury may accept or reject.” *State v. Reynolds*, 307 N.C. 184, 190, 297 S.E.2d 532, 535-36 (1982) (citing *State v. Hankerson*, 288 N.C. 632, 649-52, 220 S.E.2d 575, 588-89 (1975), *rev’d on other*

STATE v. DEBIASE

[211 N.C. App. 497 (2011)]

grounds, 432 U.S. 233, 53 L. Ed. 2d 306, 97 S. Ct. 2339 (1977), *State v. Brock*, 305 N.C. 532, 543-44, 290 S.E.2d 566, 573-74 (1982), *disapproved on other grounds by State v. Taylor*, 337 N.C. 597, 612-13, 447 S.E.2d 360, 370 (1994), *State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981), *State v. Biggs*, 292 N.C. 328, 340, 233 S.E.2d 512, 518-19 (1977)). As a result, assuming, without in any way deciding, that the trial court was correct in instructing the jury that the beer bottle was a deadly weapon as a matter of law, *State v. Morgan*, 156 N.C. App. 523, 529-30, 577 S.E.2d 380, 385-86 (holding that the trial court did not err by instructing the jury in a felonious assault case that an Arbor Mist wine bottle, with which the defendant hit the victim in the head, was a deadly weapon as a matter of law), *disc. review denied*, 357 N.C. 254, 583 S.E.2d 43 (2003), Defendant's evidence concerning the reason for which, manner in which, and circumstances under which he used that bottle at the time of his altercation with Mr. Lien sufficed to convert the presumption upon which the State relies from a mandatory presumption to a permissible inference. *Reynolds*, 307 N.C. at 190, 297 S.E.2d at 536. As a result, the State's reliance on the presumption of malice arising from the intentional infliction of a wound with a deadly weapon does not, given the facts of this case, provide adequate support for the trial court's refusal to submit the issue of Defendant's guilt of involuntary manslaughter to the jury.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by refusing Defendant's request for the submission of the issue of his guilt of the lesser included offense of involuntary manslaughter to the jury. Had the jury been permitted to consider the issue of Defendant's guilt of involuntary manslaughter, there is a reasonable possibility that it might have concluded that he acted "without intention to kill or inflict serious bodily injury, and without either express or implied malice," making him guilty of involuntary manslaughter rather than second degree murder. *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963) (citations omitted). "In this setting, and with credibility a matter for the jury, the court should have submitted involuntary manslaughter with appropriate instructions" to the jury. *State v. Wrenn*, 279 N.C. 676, 683, 185 S.E.2d 129, 133 (1971). As a result, Defendant is entitled to a new trial.

NEW TRIAL.

Judges ROBERT C. HUNTER and ROBERT N. HUNTER, JR. concur.

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

STATE OF NORTH CAROLINA v. CURTIS EDWIN LEYSHON

No. COA10-1144

(Filed 3 May 2011)

1. Constitutional Law— right to counsel—no waiver—forfeiture

The trial court in a driving while license revoked case did not err by appointing counsel against defendant's wishes and then proceeding without defendant's appointed counsel. Defendant had not clearly and unequivocally waived his right to counsel before the appointment and defendant then forfeited his right to counsel by his behavior.

2. Appeal and Error— revocation of driver's license—outside scope of judgment appealed

Defendant's contention that his driver's license was revoked without due process was not properly before the Court of Appeals because it was outside the scope of the judgment being appealed.

3. Constitutional Law— due process—capacity to proceed—hearing after examination—local hearing

Defendant's due process rights were not violated in a driving while license revoked case because N.C.G.S. § 15A-1002 did not require the court to conduct a hearing *before* ordering an examination of defendant's capacity to proceed and defendant did not request a hearing after his examination was completed. Furthermore, although the trial court erred by ordering defendant, who was charged only with a misdemeanor, committed to a state facility to determine his capacity to proceed before he had a local examination, the issue was moot because the terms of the challenged trial court order had already been carried out.

4. Evidence— judicial notice—Federal Register—regulations cited not relevant

The trial court did not err in a driving while license revoked case by not taking judicial notice of the Federal Register because the federal regulations defendant cited had no relevance to the North Carolina crime of driving while license revoked.

5. Constitutional Law— right to speedy trial—any delay caused by defendant

The trial court did not violate defendant's constitutional right to a speedy trial in a driving while license revoked case. Any

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

delay in defendant's trial was caused by defendant's failure to state whether he asserted or waived his right to counsel.

Appeal by defendant from judgment entered 9 March 2010 by Judge James U. Downs in Watauga County Superior Court. Heard in the Court of Appeals 10 March 2010.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State.

Curtis Edwin Leyshon, pro se.

THIGPEN, Judge.

Defendant Curtis Leyshon appeals from a conviction of driving while license revoked. Five principal issues are presented on appeal: (1) whether the trial court erred by appointing counsel and by proceeding without appointed counsel; (2) whether Defendant's due process rights were violated when the Division of Motor Vehicles ("DMV") revoked his driver's license; (3) whether Defendant's due process rights were violated when he did not receive a hearing before the trial court ordered him committed for an examination to determine his capacity to proceed, and whether the trial court violated Defendant's due process rights by committing him when he was only charged with a misdemeanor; (4) whether the trial court erred by not taking judicial notice of the Federal Register; and (5) whether the trial court violated Defendant's right to a speedy trial. We conclude that Defendant's argument regarding DMV's revocation of his driver's license is not properly before us, and his contention that the trial court violated his due process rights by committing him when he was only charged with a misdemeanor is moot. For all other issues, we find no error. On or about 26 January 2007, Defendant received a citation for driving while license revoked in Watauga County, North Carolina. On or about 13 June 2007, Defendant was found guilty of driving while license revoked in Watauga County District Court. Defendant appealed his conviction to the Watauga County Superior Court.

On 7 January 2008, the trial court held a hearing to determine whether Defendant waived or asserted his right to counsel. Defendant failed to respond to the trial court's inquiry. On 14 July 2008, the trial court held another hearing to determine whether Defendant waived or asserted his right to counsel. Defendant stated, "I'm not waiving my right to assistance of counsel[,] but when the court appointed counsel, Defendant stated, "I refuse his counsel."

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

When asked by the trial court if he understood that he was charged with driving while license revoked, Defendant responded, "I know the charge[.]" After leaving the courtroom, Defendant was charged with disorderly conduct, littering, and resisting arrest for his behavior in the lobby.

On 13 July 2009, the trial court held another hearing to determine whether Defendant waived or asserted his right to counsel. When asked if he desired to represent himself, Defendant responded, "If the Court has jurisdiction, yes, sir. Until then I can't make an informed decision." The trial court explained that jurisdiction had already been determined, but Defendant refused to answer the court's question. Eventually the court stated, "[m]ark him down [as] he is going to represent himself, madam clerk, and 'll start his case later on today." Defendant continued to challenge the court's jurisdiction until the court decided to refer Defendant for an evaluation to determine whether he had the capacity to proceed. Accordingly, the trial court entered an order committing Defendant for up to 60 days to determine whether or not he had the capacity to proceed in regard to the charges pending against him.

On 3 August 2009, the North Carolina Division of Mental Health (Central Regional Hospital) issued a Forensic Evaluation concluding that Defendant was capable to proceed. The Forensic Evaluation also concluded that Defendant had no mental disorder, had a good knowledge of the legal system and a specialized knowledge of Motor Vehicle Law, clearly understood the consequences of maintaining his position, and knew that there was a method for resolving things at a minimal cost, but rejected that in favor of "standing up for what he believes in."

On 8 March 2010, Defendant was tried in Watauga County Superior Court for driving while license revoked. At trial, Defendant proceeded *pro se*. Defendant began by making numerous motions, including a request that the court take judicial notice of the Federal Register. The court denied Defendant's request, explaining that "[w]e are not under the federal registry." The State presented testimony by Trooper Searcy, the officer who issued the citation to Defendant, which Defendant requested not be transcribed. At the end of the State's evidence, Defendant made a motion to dismiss for failure to state a claim. The State summarized the evidence as follows:

First we showed that the Defendant drove a motor vehicle; That the Defendant drove a motor vehicle on a highway, Highway 105;

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

And at the time he drove the motor vehicle his driver's license was suspended; And that he had been provided notice of that in that the notice was deposited in the US Mail at least four days before the alleged driving; That the notice was mailed in an envelope with postage prepaid; That the notice was addressed to the Defendant at his address as shown by the records of the Department of Motor Vehicles. That is all included in State's Exhibit 1 that has been admitted. We say and contend that we have come forth by showing each and every element and Defendant's motion to dismiss should be denied.

The court subsequently denied Defendant's motion to dismiss. Defendant then testified on his own behalf and requested that his testimony not be transcribed.

On 9 March 2010, the jury found Defendant guilty of driving while license revoked. The trial court imposed a suspended sentence of 120 days with 30 months supervised probation. Defendant appeals.

On appeal, Defendant argues: (I) the trial court erred by forcing assistance of counsel and by proceeding without appointed counsel; (II) the trial court did not comply with N.C. Gen. Stat. § 15A-1242 because it did not make sufficient inquiry into whether Defendant understood the proceedings and did not advise him of a range of permissible punishments; (III) his due process rights were violated when DMV revoked his driver's license and when the trial court ordered an examination to determine his capacity to proceed; (IV) the trial court erred by not taking judicial notice of the Federal Register; and (V) the trial court violated his right to a speedy trial.

I. Assistance of Counsel

[1] Defendant contends the trial court erred by appointing counsel against Defendant's wishes and by proceeding without Defendant's appointed counsel. Defendant first argues the trial court violated his right to proceed without counsel when it appointed counsel at the 14 July 2008 hearing after Defendant stated he would refuse counsel and had previously waived his right to assistance of counsel at the 19 July 2007 hearing. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, — N.C. App. —, —, 683 S.E.2d 437, 444 (2009) (citation omitted). "Criminal defendants have a constitutional right to the assistance of counsel in conducting their defense. Implicit in this right to counsel is the constitutional right to

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

refuse the assistance of counsel and proceed *pro se*.” *State v. Jackson*, 128 N.C. App. 626, 628, 495 S.E.2d 916, 918 (citations omitted), *disc. review allowed in part*, 348 N.C. 286, 501 S.E.2d 921 (1998); *see also State v. Fulp*, 355 N.C. 171, 174, 558 S.E.2d 156, 158 (2002) (stating that “a defendant has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes”) (quotation marks and citations omitted). Before allowing a defendant to waive representation, a court must ensure that constitutional and statutory standards are satisfied. *Fulp*, 355 N.C. at 174-75, 558 S.E.2d at 159 (citation omitted). “First, the defendant’s waiver must be expressed clearly and unequivocally. Second, the trial court must ensure that the defendant’s waiver is knowing, voluntary, and intelligent.” *State v. Reid*, 151 N.C. App. 379, 385, 565 S.E.2d 747, 752 (citation omitted), *disc. review denied*, 356 N.C. 622, 575 S.E.2d 522 (2002). North Carolina General Statutes section 15A-1242 (2009) requires a trial court to conduct an inquiry in every case in which a defendant wishes to proceed *pro se*, and our Supreme Court has held that this inquiry satisfies any constitutional requirements. *Fulp*, 355 N.C. at 175, 558 S.E.2d at 159 (citations omitted).

In this case, the following exchange occurred at the 14 July 2008 pretrial hearing:

THE COURT: Do you understand you have the right to have an attorney represent you?

THE DEFENDANT: Yes, ma’am.

THE COURT: Do you wish to hire –

...

THE DEFENDANT: No, ma’am, I don’t.

THE COURT: Do you understand you have the right to hire an attorney? Do you understand you have the right to waive an attorney? Do you understand you have a right to a court-appointed attorney?

THE DEFENDANT: I have a right to assistance of counsel.

THE COURT: Which do you want?

THE DEFENDANT: If the Court will not establish on the record jurisdiction, I don’t need an attorney.

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

THE COURT: We're given jurisdiction through the Constitution, and the North Carolina Constitution of this state –

. . .

THE COURT: Sir, do you want an attorney or not?

THE DEFENDANT: I want to retain my right to assistance of counsel.

THE COURT: Are you going to hire an attorney? Do you want a court-appointed attorney, or do you want to waive that right?

THE DEFENDANT: As soon as jurisdiction is established.

THE COURT: Sir, if you refuse to answer my question, I'm going to say that you're going to represent yourself.

THE DEFENDANT: I'm not waiving my right to assistance of counsel.

THE COURT: Do you want me to appoint an attorney to assist you?

THE DEFENDANT: If I—if —

THE COURT: The Court will appoint him an attorney to assist him. Who will it be?

. . .

THE COURT: Eric Eller will be your attorney to assist you.

THE DEFENDANT: I'll refuse counsel from him. I refuse counsel.

. . .

THE DEFENDANT: I refuse his counsel.

THE COURT: Okay.

THE DEFENDANT: I refuse it publicly on the record.

. . .

THE COURT: Sir, you'll be here September the 29th ready to try this case.

THE DEFENDANT: I'll have no counsel.

THE COURT: That's fine. You'll represent yourself then.

THE DEFENDANT: I'm reserving my rights.

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

The court then filed an order appointing Mr. Eller to assist Defendant with his trial. The court noted that it made the order “on the court’s own motion.”

The transcript shows that Defendant refused to answer whether he waived or asserted his right to counsel, and he made contradictory statements about his right to counsel. During the hearing, Defendant clearly stated, “I’m not waiving my right to assistance of counsel,” “I want to retain my right to assistance of counsel[,]” and “I’m reserving my rights.” Yet, in the same hearing, Defendant also said “I don’t need an attorney[,]” “I refuse his counsel[,]” and “I’ll have no counsel” at trial. Furthermore, although Defendant argues in his brief that “[t]he Court determined at the initial proceeding of July 19, 2007 that Defendant could proceed without a lawyer,” Defendant refused to sign the waiver of counsel form filed on 19 July 2007, and the trial court noted on the waiver form that Defendant “refused in open court to sign.” We conclude the trial court did not err by appointing counsel at the 14 July 2008 hearing because Defendant had not clearly and unequivocally waived his right to counsel.

Defendant also contends the trial court erred when it allowed Defendant’s trial to proceed without Defendant’s appointed counsel. We disagree and conclude Defendant forfeited his right to counsel.

Here, although Defendant stated that he did not have an attorney when asked by the court before his trial on 8 March 2010, the record shows that Defendant did not clearly and unequivocally waive his right to counsel before the trial court allowed him to proceed *pro se*. Under most circumstances, this is considered a prejudicial error entitling a defendant to a new trial; however, we conclude Defendant forfeited his right to counsel by his behavior. *See State v. Boyd*, — N.C. App. —, —, 682 S.E.2d 463, 466-67 (2009) (concluding that although the trial court failed to conduct the section 15A-1242 inquiry, “defendant forfeited his right to counsel by his behavior”).

We have previously outlined the difference between waiver and forfeiture of a defendant’s right to counsel:

Although the loss of counsel due to defendant’s own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A forfeiture results

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel.

State v. Montgomery, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (citations and quotation marks omitted). Where a defendant forfeits his right to counsel by his own conduct, the trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*. *Id.* at 525, 530 S.E.2d at 69.

"Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006) (citing *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69). This court has held that a defendant forfeited his right to counsel in a number of situations. In *Boyd*, — N.C. App. at —, 682 S.E.2d at 467, we found that the defendant forfeited his right to counsel because he obstructed and delayed the trial proceedings by refusing to cooperate with either of his appointed attorneys to the extent they both withdrew and by insisting that his case would not be tried. In *Quick*, 179 N.C. App. at 650, 634 S.E.2d at 918, we concluded the defendant forfeited his right to counsel at a probation revocation hearing by failing to retain private counsel over a period of eight months after he signed a waiver forgoing his right to court appointed counsel. Likewise, in *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69, we held that the defendant forfeited his right to counsel, and the trial court did not err by requiring him to proceed *pro se*, when he had fifteen months to obtain counsel, twice released his appointed counsel and retained private counsel, caused the trial to be delayed because he was disruptive in the courtroom on two occasions, and refused to cooperate with his private counsel and assaulted him, thereby resulting in an additional month's delay in the trial.

Here, Defendant similarly obstructed and delayed the trial proceedings. The record shows that Defendant refused to sign the waiver of counsel form filed on 19 July 2007 after a hearing before the trial court. At the 7 January 2008 hearing, the court twice advised Defendant of his right to assistance of counsel and repeatedly asked if Defendant wanted an attorney. Defendant refused to answer, arguing instead, "I want to find out if the Court has jurisdiction before I waive anything." Even after the court explained the basis of its juris-

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

diction, Defendant would not state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. Likewise, at the 14 July 2008 hearing, Defendant would not respond to the court's inquiry regarding whether he wanted an attorney. Defendant adamantly asserted, "I'm not waiving my right to assistance of counsel," but he also verbally refused the assistance of the attorney appointed by the trial court.¹ At the next hearing on 13 July 2009, Defendant continued to challenge the court's jurisdiction and still would not answer the court's inquiry regarding whether he wanted an attorney or would represent himself. Instead, Defendant maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." Based on the evidence in the record, we conclude Defendant willfully obstructed and delayed the trial court proceedings by continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings. Accordingly, Defendant forfeited his right to counsel, and the trial court did not err by proceeding without Defendant's appointed counsel.²

II. Due Process

Defendant next contends his due process rights were violated when the DMV revoked his driver's license because he received nothing but a letter stating that his license was revoked. Defendant also argues his due process rights were violated because (1) he did not receive a hearing before the trial court ordered him committed for an examination to determine his capacity to proceed and because (2) he should not have been committed when he was only accused of a misdemeanor. We address each of these arguments in turn.

A. Driver's License

[2] Defendant's contention that his driver's license may not be taken away without due process is not properly before us because it is outside the scope of the judgment being appealed in this case. *See Carter v. Hill*, 186 N.C. App. 464, 467, 650 S.E.2d 843, 845 (2007). "Any party entitled by law to appeal from a judgment or order of a superior or

1. We note that there is no evidence in the record regarding whether Defendant's appointed counsel withdrew from representing Defendant.

2. Because we conclude Defendant forfeited his right to counsel, the N.C. Gen. Stat. § 15A-1242 inquiry is not required. *Boyd*, — N.C. App. at —, 682 S.E.2d at 467. Accordingly, we will not address Defendant's argument that the trial court failed to comply with § 15A-1242.

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal[.]” N.C. R. App. P. 3(a). The notice of appeal in this case references “the final judgment . . . entered March 9, 2010 in the Superior Court of Watauga County[.]” in which the jury found Defendant guilty of driving while license revoked. Thus, Defendant has properly appealed only from the court’s judgment finding him guilty of driving while license revoked, not from the DMV’s decision to revoke his license.³

B. Commitment for Examination of Capacity to Proceed

[3] Defendant also argues his due process rights were violated because (1) he did not receive a hearing before the trial court ordered him committed for an examination to determine his capacity to proceed and because (2) he should not have been committed when he was only accused of a misdemeanor.

North Carolina General Statutes section 15A-1002 (2009) addresses the determination of capacity to proceed and provides in relevant part:

(b) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant’s capacity to proceed. If an examination is ordered pursuant to subdivision (1) or (2) of this subsection, *the hearing shall be held after the examination*. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence. The court:

(1) May appoint one or more impartial medical experts . . . to examine the defendant and return a written report describing the present state of the defendant’s mental health; reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing; any expert so appointed may be called to testify at the hearing by the court at the request of either party; or

(2) In the case of a defendant charged with a misdemeanor only after the examination pursuant to subsection (b)(1) of this sec-

3. Defendant had a right to appeal the revocation of his driver’s license pursuant to N.C. Gen. Stat. § 20-25 (2009), which provides: “Any person denied a license or whose license has been . . . revoked by the Division . . . shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district in which the violation was committed, and such court or judge is hereby vested with jurisdiction[.]”

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

tion . . . may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed[.]

(Emphasis added).

Here, Defendant argues he was entitled to a hearing before the trial court ordered an examination of his capacity to proceed. Section 15A-1002, however, does not require a court to conduct a hearing *before* ordering an examination of a defendant's capacity to proceed. A defendant may request a hearing *after* the examination is complete, but the burden is on the defendant to request a hearing, and failure to do so constitutes a waiver. *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (citations omitted), *cert. denied*, 552 U.S. 997, 128 S.Ct. 502, 169 L. Ed. 2d 351 (2007). In the instant case, Defendant did not request a hearing after his examination was completed; thus, his failure to do so constitutes a waiver. *See id.*

Next, Defendant correctly contends that a defendant charged with a misdemeanor must have a local examination before a trial court can commit him to a State facility for examination of his capacity to proceed. *See* N.C. Gen. Stat. § 15A-1002(b)(2) (providing that “[i]n the case of a defendant charged with a misdemeanor *only after* the examination pursuant to subsection (b)(1) of this section . . . may [a court] order the defendant to a State facility for the mentally ill for observation and treatment”) (emphasis added). In this case, the trial court ordered Defendant, who was charged only with a misdemeanor, committed to Central Regional Hospital to determine Defendant's capacity to proceed before Defendant had a local examination. We conclude, however, that this issue is moot.

“Usually, when the terms of a challenged trial court judgment have been carried out, a pending appeal of that judgment is moot because an appellate court decision cannot have any practical effect on the existing controversy.” *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (quotation marks and citation omitted). In certain cases, however, the continued existence of the judgment itself may result in collateral legal consequences for the appellant; thus, the appeal is not moot. *Id.* at 452, 628 S.E.2d at 755 (citation omitted); *see In re Webber*, — N.C. App. —, —, 689 S.E.2d 468, 472-73 (2009) (stating that “[w]hen the challenged [involuntary commitment] order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

order is not moot”), *cert. denied*, 364 N.C. 241, 699 S.E.2d 925 (2010). Unlike an order for involuntary commitment pursuant to North Carolina General Statutes Chapter 122C, an order committing a defendant for an examination of capacity to proceed is not an adjudication of being mentally ill and cannot form the basis for future commitment. *See In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 634-35 (1977) (discussing the collateral consequences of an involuntary commitment order, including the adjudication of being mentally ill and the use of a prior commitment order as the basis for future commitment). Rather, it is merely an order for the examination of a defendant’s capacity to proceed. Even when a defendant is found incapable of proceeding, the court must then “determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes.” N.C. Gen. Stat. § 15A-1003(a) (2009).

In the instant case, the court ordered Defendant committed to Central Regional Hospital in Raleigh, North Carolina on 13 July 2009 for a period not to exceed sixty days to determine his capacity to proceed. Defendant was released after his clinical interview on 29 July 2009 and was found capable to proceed. Defendant’s term of commitment for examination has already expired by the terms of the 13 July 2009 order. Because the terms of the challenged trial court order have already been carried out, we dismiss this issue as moot.

III. Judicial Notice

[4] Defendant next argues the trial court erred by not taking judicial notice of the Federal Register. We disagree.

Defendant argues that the trial court was required to take “mandatory judicial notice” of certain “facts from the Federal Register,” specifically certain provisions of 56 FR 41394, codified at 23 C.F.R. Part 1327 (2009), which implemented the National Driver Register (“NDR”) System, and established procedures for states to participate in the NDR Problem Driver Pointer System (“PDPS”) and for other authorized parties to receive information from the NDR. *See* 23 C.F.R. § 1327.1. PDPS is “a system whereby the NDR causes information regarding the motor vehicle driving records of individuals to be exchanged between the State which took adverse action against a driver (State of Record) and the State requesting the information (State of Inquiry).” 23 C.F.R. § 1327.3(r).

We first note that Defendant did not ask the trial court to take judicial notice of a “fact” but of the applicable law, as Defendant

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

argued that he was legally exempt from obtaining a North Carolina driver's license because he was not employed as a "driver" as defined in certain provisions of the Federal Register. N.C. Gen. Stat. § 20-28 (2009) defines the crime of driving while license revoked, and N.C. Gen. Stat. § 20-4.01 (2009) provides the definitions applicable for purposes of Chapter 20. Defendant claims, however, without any citation of relevant authority, that certain definitions from the Federal Register are the controlling law for his case, instead of the applicable North Carolina statutes and the law as stated in the trial court's jury instructions.

Defendant is correct that a court can take judicial notice of provisions of the Federal Register. *See Wright v. McMullan*, 249 N.C. 591, 593, 107 S.E.2d 98, 99 (1959) ("Regulations having general application and legal effect must be published in the Federal Register, 44 U.S.C.A. § 305. The contents of the Federal Register must be judicially noticed, 44 U.S.C.A. § 307. Periodically these regulations are codified and published as Code of Federal Regulations (C.F.R.)."). Defendant's argument fails, however, because the federal regulations he cited have no relevance to the North Carolina crime of driving while license revoked. The definitions of "driver" and "motor vehicle" from the C.F.R. which Defendant claims exempt him from the requirement of having a driver's license are not applicable under N.C. Gen. Stat. § 20-8. The trial court instructed the jury as to the correct definitions of "driver" and "motor vehicle" according to N.C. Gen. Stat. § 20-4.01(7) and (23). In addition, Defendant has not specifically argued on appeal that the jury instructions as given to the jury were incorrect. In any event, the provisions of the C.F.R. as cited by Defendant are irrelevant to the definition of the crime of driving while license revoked under N.C. Gen. Stat. § 20-8, and the trial court properly refused to take judicial notice of them. Defendant's argument is overruled.

IV. Right to a Speedy Trial

[5] In his last argument on appeal, Defendant contends the trial court violated his constitutional right to a speedy trial. This argument is without merit.

In determining whether a defendant has been deprived of his right to a speedy trial, we review the following factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice resulting from the delay." *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994) (citation omitted). "The length of the delay is not *per se* determina-

STATE v. LEYSHON

[211 N.C. App. 511 (2011)]

tive of whether a speedy trial violation has occurred[.]” and “[t]he defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution.” *Id.* at 678-79, 447 S.E.2d at 351. “A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice.” *State v. Tindall*, 294 N.C. 689, 695-96, 242 S.E.2d 806, 810 (1978) (citations omitted).

In the instant case, Defendant received a citation for driving while license revoked on or about 26 January 2007 and was found guilty in Watauga County District Court on 13 June 2007. On 19 July 2007, 7 January 2008, 14 July 2008, and 13 July 2009, the court held hearings to determine whether Defendant waived or asserted his right to counsel, but Defendant failed to respond to the trial court’s inquiry. At the 14 July 2008 hearing, Defendant stated, “I’m invoking my right to a speedy trial on the record. Make sure that’s on the record. It’s been 16 months I’ve been trying to ascertain jurisdiction of the court.”

We find that any delay in Defendant’s trial was caused by Defendant’s failure to state whether he asserted or waived his right to counsel. The trial court held four hearings because Defendant refused to waive or assert his right to counsel. Defendant caused this delay. *See Tindall*, 294 N.C. at 695-97, 242 S.E.2d at 810 (holding that the defendant was not deprived of his right to a speedy trial because much of the delay was caused by defendant and he suffered no significant prejudice as a result of the delay). Although Defendant asserted his right to a speedy trial at the 14 July 2008 hearing, he failed to show that the reason for the delay was the neglect or willfulness of the prosecution, and he failed to show that he was prejudiced by the delay. *See State v. Spivey*, 357 N.C. 114, 122, 579 S.E.2d 251, 257 (2003) (stating that a defendant must show “actual, substantial prejudice” as a result of the delay). After balancing the four factors set forth above, we hold that Defendant’s constitutional right to a speedy trial has not been violated.

Dismissed in part, no error in part.

Judges STROUD and HUNTER, JR. concur.

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

MAJEWSKI ENTERPRISES, INC., PLAINTIFF v. THE PARK AT LANGSTON, INC.,
DEFENDANT

No. COA10-496

(Filed 3 May 2011)

1. Damages and Remedies— amount and certainty—enforceable oral contract—excessive water and sewer credits

The trial court did not err by finding that plaintiff had an enforceable oral contract with its builders such that damages based on defendant's receipt of excessive water and sewer credits could be properly awarded. However, the case was remanded for further findings specifically determining the damages plaintiff had suffered thus far, for findings related to the certainty of damages that may later arise, and for entry of judgment for the amount of damages which had been established with reasonable certainty.

2. Appeal and Error— preservation of issues—failure to raise at trial

Although defendant contended that plaintiff's proper cause of action was for rescission of the parties' contract based on mutual mistake of fact, defendant failed to preserve this issue since he did not raise it at trial as required by N.C. R. App. P. 10(a)(1).

Appeal by Defendant from judgment entered 28 August 2009 and order entered 10 September 2009 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 2 November 2010.

Michael W. Strickland & Associates, P.A., by Michael W. Strickland, for Plaintiff-Appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for Defendant-Appellant.

BEASLEY, Judge.

The Park at Langston, Inc. (Defendant) appeals from the trial court's judgment in favor of Majewski Enterprises, Inc. (Plaintiff), concluding Defendant breached an enforceable agreement between the developer parties by collecting a disproportionate share of credits from the Town of Cary (Town), which were intended to reimburse the parties for certain costs incurred in the installation of water and

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

sewer lines servicing the lots on their respective properties. We affirm in part, but because it is unclear whether the damages awarded Plaintiff were calculated with reasonable certainty or if any portion thereof was based on speculation, we remand in part for additional findings of fact regarding Plaintiff's damages.

On 4 August 2008, Plaintiff filed a complaint alleging breach of contract or, in the alternative, unjust enrichment related to the parties' respective subdivision development projects. A non-jury trial commenced on 20 July 2009, and the evidence presented tends to show the following.

Both parties to this action are real estate developers engaged in subdivision development on contiguous properties in Apex, North Carolina. Where public water and sewer services were not available to either Plaintiff or Defendant's properties, the parties learned that the Town of Cary would permit them to extend such utilities to their developments and would reimburse certain construction costs involved therein if the water and sewer lines were built with capacity to serve additional properties in the future. Based on this understanding, the parties entered into a written agreement on or about 12 October 2001 (Co-Development Agreement), which provided for their division of the costs associated with bringing the municipal water and sewer lines to their respective subdivisions and detailed their specific arrangement. They "agreed to share the development responsibilities and the costs and expenses" incurred in the extension of water and sewer services "on a pro rata basis according to the number of lots" each party undertook to develop following final site plan approval. As such, Plaintiff would pay 63% of the costs and expenses, and Defendant bore responsibility for 37% thereof. The Co-Development Agreement also provided that Plaintiff would pay Defendant the sum of \$7,500.00 for supervising construction of the utility lines. Aside from a final \$1,866.00 invoice from Defendant to Plaintiff, where Plaintiff had withheld the payment thereof due to a dispute regarding the bill, the parties duly paid their respective shares of the water and sewer line construction and attendant costs.

On 21 October 2002, Plaintiff and Defendant entered into a Reimbursement Contract with the Town of Cary, pursuant to which the Town agreed to reimburse the parties for costs incurred in constructing a sewer line, water line, and appurtenances (the Project) by crediting such costs against the related development, or "impact," fees related thereto. Because there were two types of development

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

costs associated with the Project—(i) construction costs and (ii) development fees—“[r]eimbursements [would] be made based upon the cost of construction upon completion of the Project less the estimated water and sanitary sewer development fees which [were] considered prepaid by the Developer.” Of the \$470,122.00 incurred in total construction costs, \$353,394.00 represented the sewer line construction, and \$116,728.00 represented construction of the water line. These component figures thus constituted the amount of credit available for each utility, from which each reimbursement would be debited. In this manner, “[w]ater and sanitary sewer development fees [would] be considered prepaid for [the parties’ subdivisions] . . . up to the value of the water and sanitary sewer construction cost respectively identified.” Accordingly, when the parties’ builders went to obtain a building permit from the Town, they would “cash in” their respective credits, and the reimbursements would be docked from those values, representing the amount of impact fees deemed to have been prepaid and collected by the Town, until no credits remained. In the case that the parties’ costs were not fully reimbursed, because “the cost of the project exceed[ed] their fee needs or otherwise, the Reimbursement Contract provided for cash reimbursements “as other people connect to the line and pay their fees.” Specifically, “reimbursement of half of the water and sanitary sewer development fee [would] be . . . applicable for connection from other properties within the drainage area of the project” if other developers later sought to tap into the lines and thereby get the benefit of the parties’ construction.

As proof of entitlement to the development fee credits, the Reimbursement Contract required a letter “signed by the Developer” authorizing the use of such credits in order for any building permit to be issued pursuant to the reimbursement arrangement. Therefore, the parties, with the Town’s assistance, created certificates to provide to their builders, who could then turn the forms over to the Town when they were ready to have a particular lot permitted for sewer and water. Each certificate was signed by both parties, and allocated to each lot a water credit of \$1,904.00 and a sewer credit of \$2,866.00, based on the Town’s development fee schedule for water and sewer connections, respectively, in place at the time. The Town would accept the signed certificate and waive its impact fees for water and sewer hook-up connection—as assessed “at the time of site development”—in lieu of requiring payment from the builder. When the parties met in 2004 to apportion the water and sewer credits, it was their intention to receive those credits at the same percentage at which

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

they bore costs and expenses under the Co-Development Agreement: 63% to Plaintiff and 37% to Defendant. After signing and allotting the certificates between them, the parties independently issued the certificates for individual lots in their respective subdivisions and made them available to their builders for submission to the Town when applying for building permits.

Defendant's lots were purchased by six or seven different builders. In selling its lots, Defendant would add the face-value price of the certificate by including that amount as a closing cost. Thus, a builder who purchased a lot in Defendant's subdivision would pay Defendant not only the purchase price of the real estate but also a separate \$4,770.00, representing the dollar amount of the combined water and sewer credits available for the subject property. In exchange for the additional cost, Defendant would provide the builder with a certificate at closing so that the builder could redeem the credits when it was ready to permit the lot with the Town, eliminating the builder's obligation to pay the water and sewer fees. Plaintiff's method of selling certificates to its builders was conducted differently, as it did not charge its customers any additional fee up front at closing. Where Plaintiff had only two tract builders—Old South Homes (Old South) and K Hovnanian Homes (K Hov)—these entities did not want to bear the added expense of multiple certificates at the time they purchased various lots from Plaintiff. By Plaintiff's own admission at trial, through testimony of its principal, Christopher Majewski, Plaintiff had a "gentlemen's agreement" with Old South and K Hov, providing that in lieu of paying water and sewer fees directly to the Town when they sought to permit their construction on any particular lot, the builders would instead purchase the respective certificate directly from Plaintiff at that time. Still, Mr. Majewski did not dispute that, unlike Defendant's manner of listing the certificate value on the closing statement for the sale of its lots, neither of Plaintiff's builders had a written contractual obligation to purchase any of the water and sewer certificates provided them by Plaintiff.

Defendant developed and sold its lots more quickly than Plaintiff and, accordingly, its builders obtained building permits earlier in time than Plaintiff's builders did. While unbeknownst to the parties at the time they executed the Reimbursement Contract, the water and sewer reimbursements were calculated separately by the Town such that one or the other could be fully depleted more quickly. Between 2004 and 2006, Defendant used up \$64,736.00 of the available water credits but only \$106,121.00 of sewer credits during roughly the same time

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

period, totaling a redeemed dollar amount of \$170,857.00. While this amount was less than 37% of the combined water and sewer credits available to the parties (\$173,945.14), the water reimbursements obtained by Defendant constituted more than half of the water credits available. Consequently, Defendant had obtained a disproportionate percentage of the water credits by the time they were exhausted, and several of Plaintiff's lots were not eligible for a water reimbursement. While additional funds for sewer reimbursement remained at Plaintiff's disposal, each of Plaintiff's built-on lots had already been credited for sewer at that time. Plaintiff sought to recoup \$21,546.64, the amount Defendant allegedly received in excess of its pro rata share, but Defendant refused Plaintiff's demands.

The trial court made findings consistent with the recitation of facts above and specific computations related thereto, as detailed in the following findings of fact:

13. As a result [of Defendant's obtaining building permits more quickly than Plaintiff], Defendant obtained [\$21,546.64] in water reimbursements constituting [55%] of the reimbursement paid.

14. Defendant has obtained all of its sewer credits except [\$3,088.14] which remains available to Defendant.

15. If Plaintiff obtains sewer reimbursements, at the rate of [\$2,886.00] per lot, for all of its' [sic] remaining lots, it will have received [\$21,546.64] less than [63%] of the total reimbursement. In addition, there will be [\$24,768.86] of unused sewer credit reimbursements. This sum is approximately the total of the overpayment to Defendant for water reimbursements, together with Defendant's unused sewer credits.

In Finding of Fact 16, the trial court described the overpayment as "the result of an error by Plaintiff and Defendant as to how to collect their respective percentages caused by not realizing that water and sewer reimbursements were treated independently by the Town of Cary." Findings of Fact 17 and 18 indicate that Plaintiff could "assign [its] excess sewer credits to Defendant"—which has additional unsold lots that "would be eligible for sewer credits"—and that the Town has sometimes "agreed to extend the reimbursement [expiration] date for developers who have unsold lots in their subdivisions." By judgment entered 28 August 2009, the trial court awarded Plaintiff \$21,546.64 and awarded Defendant \$1,866.00 based on conclusions of law that: "[t]he parties entered into an enforceable agreement pursuant to which Plaintiff was to receive [63%] and Defendant was to

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

receive [37%] of the water and sewer reimbursements paid by the Town of Cary”; a methodological error in collecting the reimbursements led to Defendant’s receipt of \$21,546.64 over its agreed upon percentage for water reimbursements; and the actions of both Defendant—“though inadvertent”—and Plaintiff—in withholding the final payment due Defendant—constituted breaches of the parties’ agreement. The trial court further ordered Plaintiff to “take any action necessary to ensure that the Town of Cary allows Defendant to utilize the sewer credits in the amount of [\$21,546.64] which Plaintiff is unable to utilize because Plaintiff did not receive its share of water credits and thus has excess sewer credits.”

On 8 September 2009, Defendant filed a motion to amend the judgment pursuant to Rules 52(b) and 59(e) of the North Carolina Rules of Civil Procedure, which was denied by the trial court by order entered 10 September 2009. Defendant timely filed notice of appeal from both the 28 August 2009 judgment and the 10 September 2009 order denying its motion to amend.¹

On appeal, Defendant argues the trial court erred in finding Plaintiff had an oral agreement with its builders and contends, rather, that Plaintiff’s builders had no obligation to purchase its water and sewer credits such that there could be no damages to Plaintiff. Defendant also argues that, if damages are appropriate, Plaintiff’s claim was brought prematurely, rendering the trial court’s award speculative. Finally, Defendant argues that the trial court’s separate division of the water and sewer credits, each by the 63% to 37% ratio laid out in the Co-Development Agreement, was not contemplated or agreed to by the parties and that the appropriate remedy was grounded not in breach of contract but through an action for rescission based on mutual mistake.

Our review of an order or judgment arising from a bench trial is clearly defined:

It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial

1. Defendant makes no argument directed at the 10 September 2009 order denying its motion to amend the earlier judgment and, thus, abandons his appeal from this latter order. *See* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”)

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (internal citations omitted).

I.

[1] Defendant argues that Plaintiff cannot demonstrate any damages in this matter because it did not obligate its customers to purchase its water and sewer credits, and, in any event, Plaintiff's claim for damages is premature. We address each contention in turn.

First, Defendant alleges that even if its inadvertent taking of a higher percentage of water credits than that contemplated by the Co-Development Agreement can be considered a breach thereof, Plaintiff cannot demonstrate damages. Where Plaintiff sold its credits to the builders each time they were ready to apply for a building permit, "rather than as a component of the lot's price" like Defendant did, Defendant claims Plaintiff's builders "have no legal obligation to purchase water/sewer credits from [Plaintiff] in the first instance." As such, Plaintiff's builders are not bound to buy Plaintiff's certificates and can instead deliver the water and sewer hookup fees, which must be paid as a condition of pulling a building permit, directly to the Town of Cary. Defendant argues that Plaintiff cannot maintain this breach of contract claim where "its damages are premised only on the possibility its customers will continue to gratuitously purchase water and sewer certificates as opposed to paying these same fees to the Town."

Finding of Fact 10, however, states "Plaintiff obtained money for its certificates pursuant to an oral agreement with its' [sic] builders at the time they obtained their building permits." Defendant's argument that there is no support for this finding by the trial court focuses on an admission by Mr. Majewski that "neither [of the two builders that purchased Plaintiff's lots] "had any contractual obligation to purchase any of these certificates." Mr. Majewski agreed during his deposition that Plaintiff's builder "had no obligation, no contract, no agreement to purchase these water and sewer credits . . . [o]ther than a good Christian man going back on his word." Notwithstanding this testimony, however, it is apparent that Mr. Majewski either believed the question to be whether Plaintiff had a *written* agreement with its builders or simply did not understand that a verbal agreement may constitute a contract. While there may not have been a written con-

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

tract requiring Plaintiff's builders to pay Plaintiff for and utilize the reimbursement credits, Mr. Majewski described the understanding that Plaintiff's builders would indeed purchase Plaintiff's certificates as a "gentlemen's agreement." On redirect examination, Plaintiff's counsel sought to clarify Mr. Majewski's testimony, and the following colloquy transpired:

Q. Mr. Majewski, when you were looking at your deposition, I know you said that you didn't have a formal agreement. By "formal agreement," do you mean written agreement?

A. I do not have a written agreement.

Q. Did you have a verbal agreement with Old South that they would take these credits and use them?

A. I had a verbal agreement with Old South.

Q. Okay. And how about with K Hov?

A. Yeah, I'd call it a verbal agreement because they agreed. Yes, I did have a verbal agreement with K Hov as well.

This testimony constitutes competent evidence for the trial court's finding that Plaintiff had an oral agreement with its builders obligating the latter to purchase water and sewer credits from the former. As such, the existence of a valid contract with its builders supported Plaintiff's claim for damages in this action.

Defendant also argues that, "[e]ven assuming [Plaintiff] could show damages, its claim for recovery has been brought prematurely" because Plaintiff has not yet actually suffered any damages and any award by the trial court was based on speculation or conjecture.

"The trial court's authority to award damages in a breach of contract action is well established." *Southern Bldg. Maintenance v. Osborne*, 127 N.C. App. 327, 331, 489 S.E.2d 892, 895 (1997).

The party claiming these damages bears the burden of proving its losses with reasonable certainty. While the reasonable certainty standard requires something more than "hypothetical or speculative forecasts," it does not require absolute certainty.

And, "[w]hile the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law. Such questions are, therefore, fully reviewable by this Court."

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

Matthews v. Davis, 191 N.C. App. 545, 551, 664 S.E.2d 16, 20-21 (2008) (internal citations omitted); *see also Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 287, 258 S.E.2d 778, 785 (1979) (“[A] party seeking recovery for losses occasioned by another’s breach of contract need not prove the amount of his prospective damages with absolute certainty; a reasonable showing will suffice.”).

In the case *sub judice*, while some portion of the trial court’s award of damages to Plaintiff was easily ascertainable based on how many of Plaintiff’s lots ready for permitting were not eligible for water credits, we are mindful of the “general rule [that] the injured party in a breach of contract action is awarded damages which attempt to place the party, insofar as possible, in the position he would have been in had the contract been performed.” *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 571, 500 S.E.2d 752, 757 (1998). In that regard, even if Plaintiff had 63% of the water credits at its disposal, it would not have been able to take advantage of the reimbursement for lots that it was ultimately unable to develop or sell. Moreover, where the Reimbursement Contract between the parties and the Town was set to expire on 21 October 2012, it is also possible that if any number of the Plaintiff’s lots indeed became permit-ready but only after that date, the Town would not honor the certificates—whether for water or sewer credits—thereafter. While the trial court did find as a fact that “[i]n some instances the Town of Cary has agreed to extend the reimbursement date for developers who have unsold lots in their subdivisions,” it made no findings as to how many of Plaintiff’s lots were ready for permitting after the water credits ran out. Nor does the trial court’s judgment contain findings reflecting the status of the remaining lots for which Plaintiff’s builders would potentially be seeking permits. Additional findings related to the probability that such would actually occur on or before 21 October 2012, or if after that date, whether the Town would indeed extend the reimbursement date of the certificates, would have provided the reasonable certainty necessary to support the trial court’s damages award at full value of the potential credits Plaintiff’s builders could have tendered had Defendant’s exhaustion of the water credits not prohibited them from doing so.

This is not the typical case involving prospective damages—often related to lost profits—where the injured party can only give an approximation of its losses. The amount of damages themselves is not speculative, as the value of each credit that would have been available to Plaintiff can indeed be proved to an absolute mathematical

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

certainty because the figures involved in the calculation were established prior to any breach by Defendant. It is, rather, the occurrence of certain contingencies that will determine what “position [Plaintiff] would have been in had the contract been performed.” While we disagree with Defendant’s contention that Plaintiff’s claim has been brought prematurely because its remaining certificates have not yet expired—for Plaintiff already recognized that Defendant’s breach posed an actual threat to its ability to recover 63% of the development costs—we do agree that the trial court’s failure to find that Plaintiff would even have a market for its remaining certificates seriously undermines the reasonable certainty of the judgment. The effect of the trial court’s assumption—without making supportive findings—that certain contingencies would happen requires Defendant to “reimburse” Plaintiff for losses that may not be incurred. This creates a potential windfall for Plaintiff at Defendant’s expense, where the trial court’s judgment allots Plaintiff the cash value for credits that may have never materialized into their money equivalent. In awarding the entire lump sum value of the water credits lost by Plaintiff, the judgment makes no distinction between the damages actually suffered, in the case that Plaintiff had to reimburse its builders for water credits that were not honored by the Town, from those which may not occur. We cannot discern from the findings of fact or conclusions of law whether the trial court considered the level of certainty attached to Plaintiff’s prospective damages. Thus, we likewise cannot determine whether the award was based on a reasonable certainty that the contingencies which would lead to such losses would indeed happen or whether that unspecified portion of the award reflecting future damages was based on mere conjecture. Therefore, we remand this case to the trial court for findings demonstrating the amount of damages Plaintiff has actually incurred, based on the number of permitted lots for which no water credit was available, and findings determining whether Plaintiff can establish, to a reasonable degree of certainty, that its builders would have been able to avail themselves of credits exhausted by Defendant for the remaining unsold lots or uncompleted construction thereon. Where the Reimbursement Contract also provided for cash reimbursement, up to the parties’ full costs, in the case that other developers want to “tap into” the lines funded by Plaintiff and Defendant, the trial court may also consider evidence related thereto in determining the reasonable probability that Plaintiff would have been completely reimbursed.

MAJEWSKI ENTERS., INC. v. THE PARK AT LANGSTON, INC.

[211 N.C. App. 525 (2011)]

II.

[2] Defendant argues that Plaintiff's proper cause of action here was for rescission of the parties' contract based on mutual mistake of fact. However, Defendant never raised this issue before the trial court. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). In fact, the only reference to mutual mistake in the record was made by the trial court itself, where the trial judge stated at the close of the parties' evidence:

Gentlemen, you all created a business mess I guess you all expect me to settle. . . .

I mean, you put a system in place and honestly worked on it and gave it a lot of thought, effort, and it seems to me tried to be fair to each other, and the way in which you created this situation, as we said, by kind of front-end loading the credits so both of you would get your money back quicker, ended up in unintended and unanticipated consequences that benefited one more than the other and adversely affected the other, so.

And if over time, in an ideal world, you know, things get developed and credits get paid and all that, perhaps nobody gets harmed, but right now, we don't have a clue if that will work, so.

I think, unfortunately, I'm required to sort of take the black letter law and lay it down over top of these facts to determine what the rights and obligations of the parties are, if it fits. It may not even fit.

It comes close to kind of a mutual mistake, but it's not quite a mutual mistake. Not quite. Not quite.

Defendant never requested rescission based upon the theory of mutual mistake. As such, Defendant cannot now raise this issue, and we dismiss this argument.

In light of the foregoing, we affirm the conclusion that Plaintiff had an enforceable, oral contract with its builders such that damages based on Defendant's receipt of excessive water credits can be properly awarded, but we remand the judgment for further findings specifically determining the damages Plaintiff has suffered thus far, for findings related to the certainty of damages that may later arise, and

STATE v. COBOS

[211 N.C. App. 536 (2011)]

for entry of judgment for the amount of damages which has been established with reasonable certainty.

Affirmed in part; Remanded in part.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA v. DAVID DE LA SANCHI COBOS

No. COA10-557

(Filed 3 May 2011)

1. Indictment and Information— cocaine trafficking—amount omitted—added by amendment—no subject matter jurisdiction

The trial court lacked subject matter jurisdiction to try defendant for conspiracy to traffic in cocaine where the initial indictment did not specify the amount of cocaine involved, an essential element. An indictment may not be amended to substantially alter the charge in the indictment, and a party may not consent to subject matter jurisdiction.

2. Drugs— cocaine trafficking—admission of unidentified white powder—not prejudicial—other evidence

Defendant could not show that the admission of a white plastic bag containing an unidentified white powder was prejudicial in a cocaine prosecution where another bag of cocaine, weighing eighty-three grams, was properly admitted into evidence.

3. Cocaine—lay identification—not prejudicial

Where an eighty-three gram bag of cocaine was properly admitted into evidence, there was no plain error in the admission of an investigator's lay identification of a white powder in another bag of cocaine.

4. Appeal and Error— hearsay—no objection or motion to strike—not considered

The question of whether an investigator's testimony was hearsay was reviewed only as plain error where defendant never objected to or moved to strike the testimony on hearsay grounds. There was no plain error.

STATE v. COBOS

[211 N.C. App. 536 (2011)]

5. Appeal and Error—preservation of issues—constitutional issue—not raised below—not considered

A Confrontation Clause issue was not properly before the Court of Appeals where it was not presented to the trial court below.

Judge STEELMAN concurring.

Appeal by Defendant from Judgment entered 13 November 2009 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Kimberly P. Hoppin for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

David De La Sancha Cobos (“Defendant”) appeals his convictions for conspiracy to traffic cocaine and possession with intent to sell or deliver cocaine. The indictment for the conspiracy charge failed to allege an essential element of the crime. At trial, the court amended the indictment to include that element. We agree with Defendant’s argument that the trial court lacked jurisdiction to do so; therefore, the trial court also lacked jurisdiction to try Defendant for that crime. Consequently, Defendant’s conspiracy conviction must be arrested. For the reasons stated below, Defendant’s remaining arguments are not meritorious.

I. Factual and Procedural Background

On 21 April 2009, a Wake County grand jury indicted Defendant for conspiracy to traffic cocaine and possession with intent to sell or deliver cocaine. The conspiracy indictment read as follows:

The jurors for the State upon their oath present that on or about March 12, 2009, in Wake County, the defendant named above unlawfully, willfully and feloniously did conspire with Facundo Ausencio Marquez and Enoe Jaramillo Martinez to commit the felony of trafficking to deliver Cocaine, which is included in Schedule II of the North Carolina Controlled Substances Act. This act was done in violation of NCGS 90-95(h) of the North Carolina Controlled Substances Act.

STATE v. COBOS

[211 N.C. App. 536 (2011)]

At the beginning of the trial before the jury was empaneled, the State moved to amend the conspiracy indictment to strike “and Enoe Jaramillo Martinez.” The State also moved to add the words “to deliver 28 grams or more but less than 200 grams of cocaine,” although counsel for the State opined that such an amendment was not necessary. Defendant did not object to the first amendment, and the trial court allowed it. As to the second amendment, defense counsel stated that he disagreed with the State’s contention that an amendment was not required, but did not oppose the motion to amend because his client was in custody. The trial court allowed the amendment, and Defendant entered a plea of not guilty as to all charges.

The State’s evidence tended to show the following. On 12 March 2009, Officer M.D. Faulcon of the Raleigh Police Department (“RPD”) received a phone call from an informant, Jose Lopez, who indicated he knew a Hispanic man from whom he (Lopez) could purchase two or three ounces of cocaine. Lopez referred to this person as “David.” Lopez provided two telephone numbers for David, a current number as well as an old number. Officer Faulcon had worked with Lopez on two or three prior occasions and found him to be reliable. Lopez had previously provided information in exchange for dismissal or reduction of criminal charges or monetary compensation.

Using the information provided by Lopez, Officer Faulcon identified Defendant as the individual who would be able to provide the cocaine. He confirmed Defendant’s identity by showing a picture of Defendant to Lopez. Officer Faulcon and his supervisor then contacted the Wake County Sheriff’s Department (“WCSD”) in order to coordinate the operation because Lopez indicated the transaction would take place in Zebulon or Wendell, outside of RPD’s jurisdiction. Officer Faulcon instructed Lopez to set up the purchase at a store in Zebulon.

Lopez scheduled the sale for the same day, and Lopez, Officer Faulcon, and other RPD officers arrived at the WCSD drugs and vice unit headquarters to coordinate the operation around 5:00 p.m. Following the meeting, the officers then escorted Lopez back to the RPD facility where his vehicle was parked. They then searched the vehicle as well as his person for contraband or weapons. The officers wired Lopez’s vehicle with electronic monitoring equipment so they could listen to his conversations. Investigator Daniel Wright of WCSD arranged for a special response team to assist in the operation.

Following the search of Lopez’s vehicle, officers followed Lopez to a Food Lion in Zebulon where the buy was supposed to take place. Defendant notified Lopez there were police cars in front of the Food

STATE v. COBOS

[211 N.C. App. 536 (2011)]

Lion, so the location of the transaction was changed to the parking lot of a nearby Compare Foods store. The special response team and other officers redeployed to the new location.

After receiving a pre-arranged signal from Lopez, the special response team arrested Defendant and an individual later identified as Facundo Marquez. After the arrest, Investigator Wright arrived at the scene and was directed to Defendant's truck, which had a plastic bag on the front seat containing eighty-three grams of a white powdery substance. Another officer searched Defendant and recovered a second plastic bag containing a white powdery substance from his pocket.

Both plastic bags and their contents were sent to the City-County Bureau of Identification for analysis. The powder found in Defendant's vehicle was determined to be cocaine, and the powder and plastic bag were eventually admitted into evidence. The contents of the bag found on Defendant's person was not analyzed or identified by a forensic chemist. At trial, this substance was eventually admitted into evidence only as "a white plastic bag with white powder in it." Investigator Wright testified that, based on his experience, he believed both substances to be cocaine.

The State also presented testimony from Marquez, who testified as follows. Marquez had previously sold Defendant cocaine in \$50 to \$150 quantities. In this case, Marquez explained, Defendant phoned Marquez and stated he had a deal with another individual for three ounces of cocaine (worth \$3000). The two agreed that Defendant would obtain cocaine from Marquez and then transfer it to another person. It was Marquez's understanding that he was to deliver the cocaine to Defendant, Defendant would sell it to a third party, and Marquez would then be paid the \$3000 for the cocaine. When Marquez arrived at the Compare Foods location, he found Defendant sitting in his truck, approached him, and gave him the cocaine. Marquez then went into the store to "buy some things."

At the close of the State's evidence, Defendant moved to dismiss both charges, and the trial court denied the motion. Defendant did not offer any evidence.

At the conclusion of his trial, the jury convicted Defendant of conspiracy to traffic in cocaine by delivery of 28 grams or more but less than 200 grams under section 90-95(h) and possession with intent to sell and deliver cocaine under section 90-95(a)(1). The trial court consolidated the offenses and sentenced Defendant to a term of 35 to 42 months in prison. Defendant gave oral notice of appeal.

STATE v. COBOS

[211 N.C. App. 536 (2011)]

II. Jurisdiction

We have jurisdiction over Defendant's appeal of right. *See* N.C. Gen. Stat. § 15A-1444(a) (2009) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered."); N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal shall be to this Court).

III. Analysis**A. The Conspiracy Indictment**

[1] Defendant first argues the conspiracy indictment was fatally defective and that the trial court committed reversible error in allowing the State's motion to amend the indictment by adding the language "to deliver 28 grams or more but less than 200 grams of cocaine." We agree.

Whether an indictment is fatally defective is a question of law reviewed by this Court *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "[I]t is well-settled that 'the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division.'" *Id.* at 747, 656 S.E.2d at 712 (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)).

"Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citing *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969)). "An indictment charging a statutory offense must allege all of the essential elements of the offense." *Id.* (citing *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975)). In order to allege all of the essential elements, an indictment for conspiracy to traffic in cocaine must allege the defendant facilitated the transfer of "28 grams or more of cocaine." *State v. Epps*, 95 N.C. App. 173, 175, 381 S.E.2d 879, 881 (1989). A conviction based on a flawed indictment must be arrested. *State v. Outlaw*, 159 N.C. App. 423, 428, 583 S.E.2d 625, 629 (2003) ("Since the indictment in this case did not include the weight of the cocaine possessed and that fact was an essential element of the offense charged, judgment as relates to the conspiracy charge must be arrested.").

STATE v. COBOS

[211 N.C. App. 536 (2011)]

Here, the indictment failed to specify the amount of the cocaine, stating only that Defendant “unlawfully, willfully and feloniously did conspire . . . to commit the felony of trafficking to deliver Cocaine.” Therefore, the original indictment was missing an essential element of the offense.

The Criminal Procedure Act provides that “[a] bill of indictment may not be amended.” N.C. Gen. Stat. § 15A-923(e) (2009). Our Supreme Court “has interpreted the term ‘amendment’ under N.C.G.S. § 15A-923(e) to mean ‘any change in the indictment which would substantially alter the charge set forth in the indictment.’” *Snyder*, 343 N.C. at 65, 468 S.E.2d at 224 (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)). Because we have previously held that the weight of the cocaine is an essential element of the offense of conspiracy to traffic in cocaine, we conclude that amending an indictment by adding an essential element is “substantially alter[ing]” the indictment. Therefore, the trial court erred in adding an essential element to Defendant’s indictment.

The State argues such an error is not fatal because an indictment may be amended by consent. In *State v. Jones*, the State and the defendant agreed to try the defendant on a charge of second-degree arson even though the indictment had erroneously referenced the statute for first-degree arson. 110 N.C. App. 289, 293, 429 S.E.2d 410, 413 (1993). This Court held that

[t]he only possible “amendment” that occurred as to defendant’s indictment was the decision to proceed to trial on the charge of second degree arson with the statutory reference to [the first degree arson statute] still on the bill. We feel that this statutory reference amounts to surplusage on the bill of indictment, not a material change.

Id. at 292, 429 S.E.2d at 412. For the proposition that a defendant can consent to amending an indictment, the State relies on one line of *Jones*, which, citing our Supreme Court’s decision in *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972), states that “an indictment may not be amended in a material manner without the consent of the defendant or the grand jury.” *Jones*, 110 N.C. App. at 291-92, 429 S.E.2d at 412 (citing *Jackson*, 280 N.C. 563, 187 S.E.2d 27). While this statement in *Jones* does support the State’s argument, it was clearly *dicta* as it was not integral to the outcome in *Jones*. See *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (“Language in an opinion not necessary to

STATE v. COBOS

[211 N.C. App. 536 (2011)]

the decision is *obiter dictum* and later decisions are not bound thereby.”). Furthermore, our Supreme Court explicitly stated in *Jackson* that it did “not consider to what extent, if any, a bill of indictment may be amended with the consent of a defendant and his counsel.” 280 N.C. at 569, 187 S.E.2d at 30. Rather, the *Jackson* Court’s holding was limited: the amendment to the indictment was immaterial because it did not involve an element of the crime charged. *See id.* The amendment to Defendant’s indictment in this case, on the other hand, *added* an essential element of the offense.

Neither the Supreme Court’s decision in *Jackson* nor our decision in *Jones* held that an indictment may be amended by consent. And the statement to that effect in *Jones* is clearly *dicta*. Even if Defendant’s acquiescence could be construed as consenting to the amendment, which was required to establish the trial court’s jurisdiction, a party cannot consent to subject matter jurisdiction. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956).

We hold (1) the amendment was material and therefore substantially altered the indictment, (2) Defendant’s conduct did not confer jurisdiction upon the trial court, and (3) the trial court lacked subject matter jurisdiction to try Defendant’s conspiracy charge. The judgment against him on the conspiracy charge must be arrested. The State should have either obtained a superseding indictment from a grand jury or tried him on a bill of information. Materially amending an already flawed indictment was not the correct procedural solution under these circumstances.

B. The Cocaine Found on Defendant’s Person

[2] The State moved to admit the substance found on Defendant’s person, along with its packaging, into evidence “as a white plastic bag with white powder in it making no claims as to what it is.” The trial court admitted the evidence over Defendant’s objection. Defendant argues the trial court erred by admitting the bag of white powder into evidence because (1) the bag was irrelevant unless admitted as a bag of cocaine, (2) the bag’s probative value was substantially outweighed by the danger of unfair prejudice, and (3) the bag constituted impermissible character evidence. *See* N.C. R. Evid. 401-04. We decline to address the substance of his arguments because, even if the trial court erred in all respects, Defendant has not demonstrated he was prejudiced in a meaningful way by the admission of the substance into evidence. *See State v. Phillip*, 261 N.C. 263, 266-67, 134 S.E.2d 386, 390 (1964) (“Regardless of whether the defendant bases

STATE v. COBOS

[211 N.C. App. 536 (2011)]

his appeal upon an error of law or an abuse of discretion, it is elementary that to entitle him to a new trial he must show not only error but prejudicial error.”). The small amount of powder found on Defendant was tangential to the outcome of his case. Furthermore, Investigator Wright testified that Defendant had possession of the bag and that the bag contained cocaine. (Defendant maintains permitting this reference constituted plain error, *see infra*, but for the purpose of Defendant’s non-plain-error argument, this testimony is deemed properly admitted.) “The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance.” *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (2005). Another bag of cocaine that was found in Defendant’s vehicle, weighing eighty-three grams, was *properly* admitted into evidence. The State presented ample evidence of the elements of the charge of possession with intent to sell or deliver aside from whatever substance was discovered on Defendant’s person. Defendant’s argument fails.

[3] Defendant also contends the trial court committed plain error with respect to Investigator Wright’s identification of the substance as cocaine because he did not have personal knowledge of the substance’s discovery and because a lay opinion cannot form the basis for the identification of a substance as cocaine. *See* N.C. R. Evid. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.”); *State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., dissenting) (“[I]t is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance.”), *rev’d for reasons stated in dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009). In order to prevail in his plain error argument, Defendant must convince us that that the alleged error likely tilted the scales against him, causing the jury to reach a guilty verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Even assuming the trial court erred, for the reasons stated above, Defendant has failed to meet this high burden. Therefore, his plain error argument fails.

C. Hearsay

[4] Finally, Defendant argues he is entitled to a new trial due to hearsay testimony given by Investigator Wright. At trial, the State asked Investigator Wright what led him to believe Defendant was working with Marquez. (Presumably, the question was intended to

STATE v. COBOS

[211 N.C. App. 536 (2011)]

establish an element of the conspiracy charge.) Investigator Wright responded that he thought this was the case because Defendant “met the CI [(Lopez)] at the first location and had showed him some cocaine.” Defendant objected, arguing Investigator Wright lacked personal knowledge of that incident. The State argued Defendant opened the door to this line of questioning during cross-examination, and the trial court agreed, overruling the objection. When Investigator Wright began recounting the incident in further detail, Defendant objected again, this time on the basis of hearsay (among other grounds).

Outside the presence of the jury, the trial court was informed Investigator Wright’s testimony on this point was derived from a conversation with Lopez and was not based on direct observations. The trial court determined Investigator Wright’s proposed testimony (concerning what the informant told him about this particular exchange with Defendant) was hearsay. The trial court elaborated that this evidence went to the truth of the matter asserted—namely, whether Defendant was a participant, had knowledge of the transaction, or other essential elements of the offense—and that Defendant did not open the door to this line of questioning during cross-examination. The trial court did not instruct the jury to disregard Investigator Wright’s initial statement that Defendant “met the CI [(Lopez)] at the first location and had showed him some cocaine.” Defendant did not move to strike that testimony.

On appeal, Defendant argues Investigator Wright’s initial statement—the statement to which Defendant objected on personal knowledge grounds—was inadmissible hearsay. However, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court with a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). If inadmissibility becomes apparent only after a witness answers a question, the objecting party must move to strike the witness’s answer in order to preserve the issue for appeal. *State v. Neal*, 19 N.C. App. 426, 430, 199 S.E.2d 143, 145 (1973). Because Defendant never objected to or moved to strike the statement on hearsay grounds, he must establish the admission of that evidence constituted plain error.

As we explain above, plain error review imposes a heavy burden on a defendant. Assuming the first statement was hearsay, as the trial court concluded after learning of the basis for the statement, we do

STATE v. COBOS

[211 N.C. App. 536 (2011)]

not agree with Defendant that this evidence likely tilted the scales against him such that he is entitled to a new trial.

[5] Defendant's brief also suggests his constitutional confrontation clause rights were violated. However, that argument is not properly before this Court because it was not presented to the trial court below. *See State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985) (stating this Court is not "required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court"); *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000) ("[P]lain error analysis applies only to instructions to the jury and evidentiary matters.").

Judgment arrested in part; no error in part.

Judge STEPHENS concurs.

Judge STEELMAN concurs in a separate opinion.

STEELMAN, Judge concurring.

I concur with the majority opinion. As to section IIIB it was error for the court to admit lay opinion testimony that the substance found on defendant's person was cocaine. *State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., dissenting), *rev'd for reasons stated in dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009). However, it was not plain error. In its instructions to the jury on the charge of possession with intent to sell and deliver cocaine, the trial court charged the jury on constructive possession. Thus the jury was not limited to the substance found on defendant's person, but could also have considered the bag in the defendant's vehicle containing eighty-three grams of cocaine in deciding defendant's guilt or innocence on this charge.

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

EDWARD J. HARTY AND WIFE, MARGARET L. HARTY PLAINTIFFS v. PETER J. UNDERHILL OR FRANCES S. WHITE OR KIRSTEN K. GALLANT AS TRUSTEES FOR MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND COUNTRYWIDE HOME LOANS, INC., DEFENDANTS

No. COA10-583

(Filed 3 May 2011)

1. Creditors and Debtors— foreclosure—challenge—dismissed without prejudice

Plaintiffs' challenge to a foreclosure proceeding pursuant to N.C.G.S. § 45-21.34 was effectively dismissed without prejudice by virtue of a consent order. N.C.G.S. § 45-21.34 could not, therefore, be a basis for reversing the trial court's grant of summary judgment to defendants.

2. Unfair Trade Practices— tortious interference with contract— summary judgment proper

The trial court did not err by granting defendants' motion for summary judgment on the actions for unfair and deceptive trade practices and tortious interference with contract. There were no genuine issues of material fact on these claims and defendants were entitled to judgments as a matter of law.

Appeal by plaintiffs from order entered 26 October 2009 by Judge Joseph N. Crosswhite in Union County Superior Court. Heard in the Court of Appeals 13 October 2010.

Clark, Griffin & McCollum, LLP, by Joe P. McCollum, Jr., for plaintiff-appellants.

Hunton & Williams, LLP, by A. Todd Brown and Brent A. Rosser, for defendant-appellees.

CALABRIA, Judge.

Edward J. Harty and Margaret L. Harty (collectively, "plaintiffs") appeal the trial court's order granting Countrywide Home Loans, Inc.'s ("Countrywide"), Mortgage Electronic Registration Systems, Inc.'s ("MERS"), and Peter J. Underhill's, Frances S. White's, and Kirsten K. Gallant's (collectively, "the trustees"), as trustees for MERS (collectively, "defendants"), motion for summary judgment. We affirm.

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

I. BACKGROUND

In August 2002, plaintiffs obtained a loan from Greenpoint Mortgage Funding, Inc. ("Greenpoint"), to finance the purchase of a home in Monroe, North Carolina. The loan was secured by a deed of trust. By December 2003, plaintiffs were in default. In order to suspend foreclosure proceedings, Greenpoint proposed a "Forbearance Agreement" ("the Forbearance Agreement" or "the contract") to allow plaintiffs to pay monthly payments toward their arrears.

Plaintiffs executed the Forbearance Agreement, and Greenpoint conditionally suspended foreclosure proceedings based upon plaintiffs' regular monthly payments and payments toward the arrears. Plaintiffs agreed to pay \$5,500.00 by 11 December 2003 as well as payments of \$1,237.94 per month from 1 January 2004 through 1 December 2004. Greenpoint reserved the right to reject any payment that was not received by the sixteenth day of the month in which the payment was due.

In paragraph 16 of the Forbearance Agreement, the "Time of the Essence" clause stated, "TIME IS OF THE ESSENCE WITH RESPECT TO ALL DATES SET FORTH HEREIN" ("the time-is-of-the-essence clause"). If plaintiffs failed to comply with the terms of the Forbearance Agreement, they would be in default. In paragraph 13, the "Waiver of Notice of Default" clause stated, "YOU HEREBY WAIVE ANY FURTHER NOTICE OF DEFAULT UNDER THE MORTGAGE OR THIS AGREEMENT THEREBY PERMITTING GREENPOINT TO RESUME ANY FORECLOSURE PROCEEDING UPON THE OCCURRENCE OF A DEFAULT WITHOUT NOTICE." This paragraph allowed Greenpoint to resume foreclosure proceedings without notice.

Approximately four months after plaintiffs executed the Forbearance Agreement with Greenpoint, plaintiffs' deed of trust was transferred from Greenpoint to Countrywide,¹ subject to the Forbearance Agreement. Terms of the Forbearance Agreement with Countrywide were exactly the same. Plaintiffs were still required to make their monthly payments by the sixteenth day of each month to comply with the time-is-of-the-essence clause.

According to Countrywide, plaintiffs' monthly payments during 2004 were late because Countrywide claimed they were not received until after the sixteenth of the month in which they were due. Even though plaintiffs disputed the timeliness of their monthly payments,

1. Countrywide serviced plaintiffs' loan on behalf of the noteholder, MERS.

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

Countrywide claimed plaintiffs were in default. Since the Forbearance Agreement permitted defendants to resume foreclosure proceedings without notice, defendants initiated foreclosure proceedings by reporting plaintiffs' default to the trustees. The trustees initiated foreclosure proceedings against plaintiffs in June 2005.

On 5 July 2007, the Clerk of Court of Union County ("clerk of court") entered an order ("the clerk's order") finding that the substitute trustee could proceed to foreclosure under the terms of plaintiffs' deed of trust. Plaintiffs continued to disagree with defendants regarding the timeliness of their payments and the amount of their debt. Specifically, plaintiffs disputed the actual amount of their debt owed on the note and deed of trust. Plaintiffs appealed the clerk's order to Union County Superior Court. On 13 July 2007, the clerk of court entered a stay order precluding foreclosure by defendants.

Although the stay order was still in effect, on 23 July 2007, plaintiffs filed a complaint against defendants in Union County Superior Court. Plaintiffs alleged defendants' actions constituted unfair and deceptive practices ("UDP") and tortious interference with contract, and asserted equitable challenges to the foreclosure under N.C. Gen. Stat. § 45-21.34. The complaint sought damages in excess of \$10,000.00 and treble damages. Plaintiffs also sought preliminary and permanent injunctions against the trustees prohibiting them from foreclosing on plaintiffs' property. Pursuant to the allegations in plaintiffs' complaint, the trial court issued a temporary restraining order on 24 July 2007 forbidding defendants from foreclosing on plaintiffs' property.

On 4 October 2007, the parties entered into a consent order ("the consent order"). Under the terms of the consent order, the parties agreed that the temporary restraining order would be dissolved pending the resolution of plaintiffs' appeal of the clerk of court's foreclosure order. If plaintiffs were unsuccessful in their appeal, they would be permitted to re-seek entry of a preliminary injunction pursuant to N.C. Gen. Stat. § 45-21.34.

On 10 July 2009, defendants filed a motion for summary judgment, alleging, *inter alia*, that plaintiffs failed to forecast evidence necessary to establish claims for UDP, tortious interference with contract, and N.C. Gen. Stat. § 45-21.34. After reviewing the written material submitted by counsel and other relevant matters of record, and after hearing oral arguments, the trial court granted defendants' motion for summary judgment and dismissed all claims against defendants with prejudice on 26 October 2009. Plaintiffs appeal.

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

II. FORECLOSURE PROCEEDINGS

[1] Our General Statutes govern the procedure for challenging a foreclosure by power of sale. A party may challenge a foreclosure proceeding under either N.C. Gen. Stat. § 45-21.16 (c)(7)(d) (2009) or N.C. Gen. Stat. § 45-21.34 (2009). Plaintiffs challenged the foreclosure proceeding under both statutes.

N.C. Gen. Stat. § 45-21.16 (c)(7)(d) governs direct challenges to the foreclosure proceeding before the clerk of court. When the trustees initiated foreclosure proceedings, the clerk of court was limited to making the four findings of fact specified in N.C. Gen. Stat. § 45-21.16 (c)(7)(d). *See Mosler ex rel. Simon v. Druid Hills*, — N.C. App. —, —, 681 S.E.2d 456, 458 (2009). To authorize a foreclosure, the clerk was required to find the existence of: “(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.” N.C. Gen. Stat. § 45-21.16 (c)(7)(d) (2009). Since plaintiffs disputed the existence of a valid debt, one of the required four findings of fact, the superior court could consider plaintiffs’ appeal of the clerk’s Order of Foreclosure *de novo*. *Mosler*, — N.C. App. at —, 681 S.E.2d at 458. However, equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to N.C. Gen. Stat. § 45-21.16.

In an action to enjoin a foreclosure sale, equitable defenses must be asserted under N.C. Gen. Stat. § 45-21.34. *In re Foreclosure of Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985). Therefore, since plaintiffs’ complaint alleged, *inter alia*, that defendants should be enjoined from foreclosing on the property because they waived any irregularities in plaintiffs’ payments, plaintiffs also challenged the foreclosure proceeding under N.C. Gen. Stat. § 45-21.34.

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plain-

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

tiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction.

N.C. Gen. Stat. § 45-21.34 (2009).

Plaintiffs rely on *Meehan v. Cable*, 127 N.C. App. 336, 489 S.E.2d 440 (1997), as the authority for their N.C. Gen. Stat. § 45-21.34 cause of action for an injunction because the statute includes the words, “any other legal or equitable ground which the court may deem sufficient[.]” In *Meehan*, the plaintiff filed a complaint under N.C. Gen. Stat. § 45-21.34, arguing that the foreclosure on his property should be enjoined because he was not in default. *Id.* at 339, 489 S.E.2d at 443. Our Court held that the plaintiff’s claim was “within the jurisdiction of the superior court in an action pursuant to [N.C. Gen. Stat. §] 45-21.34.” *Id.*

Plaintiffs correctly rely on *Meehan* for their equitable defense; however, the same words in N.C. Gen. Stat. § 45-21.34 do not entitle plaintiffs to nominal damages. Plaintiffs cite *Sloop v. London*, 27 N.C. App. 516, 219 S.E.2d 502 (1975) to support their argument that a plaintiff is entitled to nominal damages in a wrongful foreclosure action. However, the plaintiff in *Sloop* filed an action against the trustee for wrongful foreclosure based on breach of fiduciary duty, which did not involve N.C. Gen. Stat. § 45-21.34. *Id.* at 519-20, 219 S.E.2d at 505.

In the instant case, plaintiffs’ complaint sought an injunction pursuant to N.C. Gen. Stat. § 45-21.34, and the trial court issued a temporary restraining order in accordance with that statute. The consent order subsequently disposed of that claim. Although the consent order dated 4 October 2007 dissolved the temporary restraining order, it further provided that the parties agreed:

in the event of an adverse ruling as to Plaintiffs in the pending foreclosure appeal, Plaintiffs shall have thirty (30) days from the date of the entry of an order denying the appeal and affirming Defendants’ right to proceed to foreclosure to move the Court for the issuance of the preliminary injunction originally sought in this action.

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

While this order could be read as allowing plaintiffs to file a new motion for a preliminary injunction in this action, as opposed to filing a new action, it does not appear that such a construction was the intent of the parties or the court. The trial court, in granting defendants' motion for summary judgment, understood that its order completely disposed of plaintiffs' case. Furthermore, plaintiffs' Statement of the Grounds for Appellate Review states that the "summary judgment order, dismissing all the plaintiff[s]' claims, is a final judgment" Therefore, plaintiffs' claim *in the instant case*, pursuant to N.C. Gen. Stat. § 45-21.34, was effectively dismissed without prejudice by virtue of the consent order. N.C. Gen. Stat. § 45-21.34 cannot, therefore, be a basis for reversing the trial court's grant of summary judgment to defendants.

III. SUMMARY JUDGMENT

[2] Plaintiffs argue that the trial court erred by granting defendants' motion for summary judgment on the actions for UDP and tortious interference with contract. We disagree.

A. Standard of Review

"This Court will uphold a trial court's grant of summary judgment 'if considering the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.' " *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 854 (2006) (quoting *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998)). The moving parties—in this case, defendants—"bear the initial burden of showing the lack of any triable issue of fact and the propriety of summary judgment." *Id.* at 294, 628 S.E.2d at 854-55 (citing *Moore*, 129 N.C. App. at 394, 499 S.E.2d at 775).

"Once the moving party has met its initial burden, in order to survive summary judgment, the nonmoving party—here, plaintiff—must produce 'a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.' " *Id.* at 294, 628 S.E.2d at 855 (quoting *Moore*, 129 N.C. App. at 394, 499 S.E.2d at 775 (internal quotation and citation omitted)). "On appeal, we view the evidence in the light most favorable to the nonmoving party and decide whether summary judgment was appropriate under a *de novo* standard of review." *Id.*

Initially, we note that plaintiffs focus their arguments on Countrywide and have excluded the trustees in their argument claim-

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

ing that the trial court erred by granting summary judgment. Since plaintiffs do not argue that the trial court's grant of summary judgment to the trustees was improper, plaintiffs have abandoned this argument. N.C. R. App. P. 28(b) (2009). Therefore, the trial court correctly granted summary judgment to the trustees. All future references to defendants will exclude the trustees.

B. Unfair or Deceptive Practices

The elements of a claim for unfair or deceptive . . . practices in violation of N.C. Gen. Stat. § 75-1.1 (2003) are: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes actual injury to the plaintiff or to his business. To prevail on a Chapter 75 claim, a plaintiff need not show fraud, bad faith, or actual deception. Instead, it is sufficient if a plaintiff shows that a defendant's acts possessed the tendency or capacity to mislead or created the likelihood of deception. Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive . . . practice.

RD&J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 748, 600 S.E.2d 492, 500-01 (2004) (internal citations omitted). "Under [N.C. Gen. Stat. §] 75-1.1, an act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. An act or practice is deceptive if it has the capacity or tendency to deceive." *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 247, 446 S.E.2d 100, 106 (1994) (internal citations and quotations omitted). "Under section 75-1.1, a mere breach of contract does not constitute an unfair or deceptive act. Egregious or aggravating circumstances must be alleged before the provisions of the Act may take effect." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910-11 (2002) (citing *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992), and *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). See also *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003) ("[I]t is well recognized . . . that actions for unfair or deceptive . . . practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [N.C. Gen. Stat.] § 75-1.1.") (citation and quotation omitted)).

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

As the moving party, defendants had the burden of showing the lack of any triable issues of fact. In the instant case, the Forbearance Agreement conditionally suspended foreclosure proceedings as long as plaintiffs performed by making timely monthly payments “on the first day of each month.” It further provided that payments could be rejected and Greenpoint reserved the right to “declare a default” under the Forbearance Agreement if payments were not received by the sixteenth day of the month in which a payment was due, or the payment was less than the full amount required under the Forbearance Agreement. According to defendants’ evidence, plaintiffs were put on notice at the time of the execution of the contract that failure to comply with the dates could lead to an automatic initiation of foreclosure proceedings. There is no dispute that plaintiffs’ payments were repeatedly received after the sixteenth day of the month in which they were due, at least one of the monthly payments was for less than the amount due, and the payment due in December 2004 was not made until 25 February 2005.

Plaintiffs argue that defendants waived the time-is-of-the-essence clause and any irregularities in plaintiffs’ payments by accepting payments after the sixteenth day of the month in which the payments were due. More specifically, plaintiffs argue that since substantial evidence was presented regarding defendants’ repeated acceptance of late payments, a jury could find “defendants had waived their right to accelerate plaintiff[s]’ debt with regard to payments due in the past, and waived their right to accelerate the debt based on future delinquent payments without first notifying plaintiffs that prompt payment would be expected in the future.”

If plaintiffs had not signed the Forbearance Agreement, which included the “Waiver of Notice of Default” clause, they may have had a valid argument that defendants had waived the time-is-of-the-essence clause by making statements and taking actions manifesting an intent that the performance required by the dates in the contract should occur at some unspecified later date. *Phoenix Ltd. P’ship of Raleigh v. Simpson*, — N.C. App. —, —, 688 S.E.2d 717, 723 (2009). However, the contract in the instant case provided a waiver of notice of default and provided that foreclosure proceedings could resume upon the occurrence of default without any additional notice.

Moreover, plaintiffs’ forecasted evidence, taken in the light most favorable to defendants, merely stated facts that indicate that plaintiffs disagree with defendants over the terms of their payments, a

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

basic breach of contract claim. As previously noted, a breach of contract claim cannot, standing alone, form the basis of an UDP claim. *Watson Elec.*, 160 N.C. App. at 657, 587 S.E.2d 95. Plaintiffs did not forecast evidence that Countrywide's actions were immoral, unethical, oppressive, unscrupulous, or substantially injurious to plaintiffs. Plaintiffs have also failed to forecast evidence that defendants' actions had the capacity or tendency to deceive plaintiffs.

Additionally, even assuming *arguendo* that defendants failed to strictly follow the terms of their contract by proceeding to foreclosure and breached their contract, plaintiffs have not shown "egregious or aggravating circumstances" attending the alleged breach of contract to recover under N.C. Gen. Stat. § 75-1.1 (2009). In the instant case, defendants offered plaintiffs a second opportunity to avoid foreclosure, delayed the initiation of foreclosure proceedings, and paid plaintiffs' taxes and insurance beginning in April 2005. These facts, without more, are insufficient to conclude that defendants' conduct was egregious or the circumstances were aggravating. Therefore, there are no genuine issues of material fact and defendants are entitled to judgment as a matter of law on this claim. The trial court properly granted defendants' motion for summary judgment as to plaintiffs' claim for UDP. Plaintiffs' issue on appeal is overruled.

C. Tortious Interference With Contract

The elements of tortious interference with contract are as follows: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff."

Beck v. City of Durham, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (quoting *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)). A plaintiff cannot maintain an action for tortious interference with a contract against a party to that contract. *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 587, 440 S.E.2d 119, 124 (1994).

In the instant case, plaintiffs' claim fails at the outset because there are no allegations that defendants interfered with the Forbearance Agreement between plaintiffs and Greenpoint. Countrywide was the assignee to the Forbearance Agreement plain-

HARTY v. UNDERHILL

[211 N.C. App. 546 (2011)]

tiffs initially executed with Greenpoint and serviced plaintiffs' loan on behalf of the noteholder MERS. See *Smith v. Brittain*, 38 N.C. 347, 354, 1844 WL 1098, at *5, 1844 N.C. LEXIS 157, at **13 (1844) ("In equity the assignee stands absolutely in the place of his assignor, and it is the same, as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties."). Defendants could not have induced Greenpoint to breach a contract that Greenpoint had already assigned because Greenpoint was no longer a party to that contract. Furthermore, to the extent plaintiffs allege that defendants took plaintiffs' deed of trust subject to the Forbearance Agreement, plaintiffs cannot maintain an action for interference with a contract against a party to that contract. *Wagoner*, 113 N.C. App. at 587, 440 S.E.2d at 124.

Since plaintiffs did not forecast evidence to show that defendants induced Greenpoint to breach the agreement, there were no genuine issues of material fact on this claim and defendants were entitled to judgment as a matter of law. The trial court properly granted defendants' motion for summary judgment as to plaintiffs' claim for tortious interference with contract. Plaintiffs' issue on appeal is overruled.

IV. CONCLUSION

The trial court properly granted defendants' motion for summary judgment. Plaintiffs' claims for UDP and tortious interference with contract were properly dismissed with prejudice by the trial court. Plaintiffs' claim pursuant to N.C. Gen. Stat. § 45-21.34 was effectively dismissed by virtue of the consent order. The trial court's order is affirmed.

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

MATTHEW DOUGLAS STINCHCOMB, PLAINTIFF V. PRESBYTERIAN MEDICAL CARE CORP., THE PRESBYTERIAN HOSPITAL, PRESBYTERIAN ORTHOPAEDIC HOSPITAL, LLC, NOVANT HEALTH, INC., NOVANT HEALTH SOUTHERN PIEDMONT REGION, LLC, ORTHOCAROLINA, P.A., CHARLOTTE ORTHOPEDIC SPECIALISTS, P.A., CRAIG D. BRIGHAM, M.D., LORRAINE WILLIAMS, L.P.N., TONYA DAVIS, R.N., KITTISHA A/K/A “KITTY” MILLS, R.N., PAGE LANDRUM, R.N., KATHRYN BAXTER, R.N., AND MAURA HUFFMAN, R.N., DEFENDANTS

Nos. COA10-478 and COA10-843

(Filed 3 May 2011)

1. Interlocutory orders and appeal—certified by trial court—immediately reviewable

Plaintiff’s appeal from the trial court’s order in a medical malpractice case which was only final as to some of the parties was immediately reviewable as the trial court properly certified the appeal pursuant to Rule 54(b).

2. Statutes of Limitation and Repose— medical malpractice—complaint filed after expiration of statute of limitations—summonses not timely issued

The trial court did not err in a medical malpractice action by granting defendants’ motions to dismiss for plaintiff’s failure to comply with the statute of limitations. Because the statute of limitations expired the day after plaintiff filed his complaint, and plaintiff failed to issue timely summonses to defendants, plaintiff failed to commence his action against defendants within the statute of limitations.

3. Pretrial Proceedings— motion to amend summonses—motion to enlarge time to issue summonses—material prejudice—denial not abuse of discretion

The trial court did not abuse its discretion in a medical malpractice action by denying plaintiff’s Motion to Amend Summonses and/or in the Alternative to Enlarge Time to Issue Summonses. Defendants would have suffered material prejudice had the trial court granted plaintiff’s motion or motions.

4. Medical Malpractice— motion to stay proceedings—not addressed

Plaintiff’s contention that the trial court erred in a medical malpractice action by denying his motion to stay proceedings against the nurse defendants was not addressed in light of the

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

Court of Appeals' determination that plaintiff's appeal from the dismissal of other defendants lacked merit.

Appeal by Plaintiff from orders entered 29 December 2009 by Judge Eric L. Levinson and 18 March 2010 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 December 2010.

Ellis & Winters LLP, by J. Donald Cowan, Jr., and Charles G. Monnett III & Associates, by Randall J. Phillips and Charles G. Monnett, III, for Plaintiff.

Lincoln Derr, PLLC, by Sara R. Lincoln and Shannon Sumerell Spainhour, for Defendants OrthoCarolina, P.A., Charlotte Orthopedic Specialists, P.A., and Craig D. Brigham, M.D.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, John D. Kocher, and Christian H. Staples, for Defendants Presbyterian Medical Care Corp., The Presbyterian Hospital, Presbyterian Orthopaedic Hospital, Novant Health, Inc., Novant Health Southern Piedmont, LLC, Tonya Davis, R.N., Maura Huffman, R.N., Page Landrum, R.N., and Lorraine Williams, L.P.N.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb and Katherine E. Fisher, for Defendant Kathryn Baxter, R.N.

Carruthers & Bailey, P.A., by J. Dennis Bailey and Jessica Harris Telligman, for Defendant Kittisha Mills, R.N.

STEPHENS, Judge.

I. Factual Background

Plaintiff Matthew Stinchcomb is a former professional football player most recently of the National Football League team, the Tampa Bay Buccaneers. On 18 October 2005, Defendant Dr. Craig D. Brigham performed lumbar disc surgery on Plaintiff. During the surgery, Plaintiff's dura was injured in what is termed an incidental durotomy. Due to repairs required to correct the incidental durotomy, Plaintiff's surgery took longer than anticipated and Plaintiff was under general anesthesia for longer than he would have been had there been no such injury. In addition, the incidental durotomy left Plaintiff unable to ambulate post-operatively as quickly as had been expected before the surgery.

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

While still in the hospital, Plaintiff complained of symptoms consistent with development of venous thromboembolism, a known complication of the lumbar disc surgery. Despite these complaints, he was released from the hospital's care on 20 October 2005. He thereupon returned to Florida. On 24 October 2005, Plaintiff was admitted to a hospital in Tampa, Florida where he was diagnosed with a pulmonary embolus. As a result of his injuries, Plaintiff alleges that he sustained substantial damages.

II. Procedural History

On 17 October 2008, Plaintiff filed a Motion to Extend the Statute of Limitations in a Medical Malpractice Action by 120 days pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. On 17 October 2008, the superior court granted Plaintiff's motion and extended the statute of limitations on Plaintiff's medical malpractice action through 17 February 2009.

Also on 17 October 2008, Plaintiff had summonses issued for each of the following defendants: Presbyterian Medical Care Corp., The Presbyterian Hospital, Presbyterian Orthopaedic Hospital, LLC, Novant Health, Inc., Novant Health Southern Piedmont Region, LLC (collectively, the "Presbyterian and Novant Defendants"), OrthoCarolina, P.A., Charlotte Orthopedic Specialists, P.A., and Craig D. Brigham, M.D. (collectively, the "OrthoCarolina Defendants"). Neither the order extending the statute of limitations nor the summonses were served on any of the defendants.

On 29 December 2008, Plaintiff had *alias* and *pluries* summonses issued for each of the Presbyterian and Novant Defendants and the OrthoCarolina Defendants (together, "Defendants"). The *alias* and *pluries* summonses referenced the original 17 October 2008 summonses.

On 16 February 2009, Plaintiff filed his complaint. Copies of the complaint and the *alias* and *pluries* summonses were sent via certified mail to each of the Defendants and received by them on 23 February 2009. As for Dr. Brigham, an individual physician named as a defendant in the lawsuit, the complaint and an *alias* and *pluries* summons were sent in "care of" the registered agent for OrthoCarolina, Robert McBride, M.D., at OrthoCarolina's corporate headquarters' address. In addition to Defendants, Plaintiff added the following individuals as defendants: Lorraine Williams, L.P.N., Tonya Davis, R.N., Kittisha a/k/a/ "Kitty" Mills, R.N., Page Landrum, R.N., Kathryn Baxter, R.N., and Maura Huffman, R.N. (collectively, the

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

“Nurse Defendants”). Summonses were issued for the Nurse Defendants on 16 February 2009.

The OrthoCarolina Defendants and the Presbyterian and Novant Defendants, on 22 and 24 April 2009, respectively, filed answers and motions to dismiss citing Rules 12(b)(2),(4),(5), and (6) of the North Carolina Rules of Civil Procedure.

On 8 October 2009, the motions to dismiss came on for hearing before Judge Eric L. Levinson, who reviewed the Mecklenburg County Superior Court video record of the oral argument presented to the Honorable Robert P. Johnston on 9 July 2009,¹ the materials submitted to the court and in the court file, and the pertinent case law. On 19 November 2009, Plaintiff filed a Motion to Amend Summonses and/or in the Alternative to Enlarge Time to Issue Summonses. On 29 December 2009, the trial court entered an order finding “that the action was not commenced within the limitations period as to these Defendants” and, therefore, granting the OrthoCarolina Defendants’ and the Presbyterian and Novant Defendants’ motions to dismiss. The trial court also denied Plaintiff’s Motion to Amend Summonses and/or in the Alternative to Enlarge Time to Issue Summonses.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the trial court certified “that this is a final judgment as to these Defendants, and there is no just reason to delay appellate review should the Plaintiff seek an interlocutory appeal.” Plaintiff filed notice of appeal on 22 January 2010.

On 25 February 2010, Plaintiff filed a Motion for Stay of Proceedings Pending Appeal seeking to stay the proceedings as to the Nurse Defendants, who were not dismissed by the 29 December 2009 order. Following a hearing before the Honorable Richard D. Boner on 4 March 2010, the trial court denied Plaintiff’s Motion for Stay on 15 March 2010. Plaintiff filed notice of appeal on 24 March 2010.

On 29 July 2010, Plaintiff moved to consolidate the appeals from the 29 December 2009 and 15 March 2010 orders. On 13 August 2010, this Court entered an order consolidating the appeals for review.

1. Judge Johnston heard oral argument on Defendants’ motions on 9 July 2009, but took a leave of absence before he could issue a ruling. Counsel for Plaintiff and Defendants consented to having another superior court judge review the videotape of the oral argument presented to Judge Johnston and then rule on the motions.

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

*III. Discussion**A. Order Granting Defendants' Motions to Dismiss**1. Grounds for Appellate Review*

[1] As a threshold issue, we must determine whether the trial court's order granting Defendants' motions to dismiss is immediately appealable. An order which does not dispose of all claims as to all parties in an action is interlocutory. *Cunningham v. Brown*, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981). Ordinarily, there is no right of appeal from an interlocutory order. *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 170, 517 S.E.2d 151, 153 (1999). However, an interlocutory order may be immediately appealed "(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Id.* at 171, 517 S.E.2d at 153 (citations and quotation marks omitted).

"When an appeal is from an order that is final as to one party, but not all, and the trial court has certified the matter under Rule 54(b), this Court must review the issue." *Signature Dev., LLC v. Sandler Commer. at Union, L.L.C.*, — N.C. App. —, —, 701 S.E.2d 300, 305 (2010) (citing *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340, 634 S.E.2d 548, 552, *disc. review denied and appeal dismissed*, 361 N.C. 167, 639 S.E.2d 650 (2006)). In this case, the trial court certified that the 29 December 2009 order "is a final judgment as to these Defendants, and there is no just reason to delay appellate review should the Plaintiff seek an interlocutory appeal." As this appeal is from an order which is final as to some of the parties, and the trial court has properly certified the appeal pursuant to Rule 54(b), we must review the issue.

2. Statute of Limitations

[2] Plaintiff first argues that the trial court erred by granting Defendants' motions to dismiss for Plaintiff's failure to comply with the statute of limitations. We disagree.

Where, as here, there is no dispute over the relevant facts, the trial court's interpretation of a statute of limitations is a conclusion of law that is reviewed *de novo* on appeal. *N.C. Dep't of Revenue v. Von Nicolai*, 199 N.C. App. 274, 277, 681 S.E.2d 431, 433 (2009).

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

In a medical malpractice action, a plaintiff's claim accrues upon the occurrence of the last act of the defendant giving rise to the claim. N.C. Gen. Stat. § 1-15(c) (2009).² The plaintiff then has three years from that date to commence the action. *Id.*; N.C. Gen. Stat. § 1-52(16) (2009). However, N.C. Gen. Stat. § 1A-1, Rule 9(j) provides that in a medical malpractice action, upon motion by the plaintiff prior to the expiration of the original statute of limitations, the time for filing the complaint may be extended for a period not exceeding 120 days. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009).

Pursuant to Rule 3 of the North Carolina Rules of Civil Procedure, “[a] civil action may be commenced by filing a complaint with the court.” N.C. Gen. Stat. § 1A-1, Rule 3(a) (2009). “Upon the filing of the complaint, summons shall be issued forthwith,^[3] and in any event within five days. . . . A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so.” N.C. Gen. Stat. § 1A-1, Rule 4(a) (2009). Rule 4(a) “contemplates the continuance of the present practice of ordinarily having summons issue simultaneously with the filing of the complaint. The five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons.” N.C. Gen. Stat. § 1A-1, Rule 4(a) cmts. “Where a complaint has been filed and a proper summons does not issue within the five days allowed under the rule, the action is deemed never to have commenced.” *Cnty. of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984).

A civil action also may be commenced by the issuance of a summons when

- (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
- (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

2. The provisions of this statute pertaining to discovery of the injury are not at issue in this case.

3. “ ‘Forthwith’ is defined by Webster as ‘Immediately; without delay, hence, within a reasonable time; promptly and with reasonable dispatch.’ *Webster’s New Int. Dic.*, 2d ed. Brown, J., in interpreting the meaning of the words ‘immediately’ and ‘forthwith,’ said in *Claus v. Lee*, 140 N.C. 552: ‘Such terms never mean the absolute exclusion of any interval of time, but mean only that no unreasonable length of time shall intervene before performance.’ ” *State v. Ball*, 255 N.C. 351, 352, 121 S.E.2d 604, 605 (1961).

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

N.C. Gen. Stat. § 1A-1, Rule 3.

It is well settled that the "summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court." *Childress v. Forsyth Cnty. Hosp. Auth., Inc.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984) (citation omitted), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Latham v. Cherry*, 111 N.C. App. 871, 874, 433 S.E.2d 478, 481 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994). "In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute." *Id.*

In this case, the last act of alleged negligence occurred on or about 18 October 2005 and the applicable statute of limitations would ordinarily have expired on or about 18 October 2008. On 17 October 2008, Plaintiff timely obtained an order extending the statute of limitations up to and including 17 February 2009. Also on 17 October 2008, summonses were issued for Defendants. Neither the order extending the statute of limitations nor the summonses were served on Defendants. On 29 December 2008, Plaintiff had *alias* and *pluries* summonses issued for Defendants. The *alias* and *pluries* summonses referenced the 17 October 2008 summonses. On 16 February 2009, Plaintiff filed his complaint. Copies of the complaint and the *alias* and *pluries* summonses were sent via certified mail to Defendants and received by them on 23 February 2009. These procedural facts are undisputed.

The original summonses were issued on 17 October 2008, approximately three months *before* Plaintiff filed his complaint on 16 February 2009. Thus, the summonses were insufficient to comply with the Rule 4(a) requirement that summons shall be issued "forthwith, and in any event within five days," "[u]pon the filing of the complaint[.]" N.C. Gen. Stat. § 1A-1, Rule 4(a). As Plaintiff concedes in his brief,

[t]he plain language of Rule 4 clearly provides that summons must be issued five days *after* the filing of a complaint. N.C. Gen. Stat. § 1A-1, Rule 4(a); *Roshelli v. Sperry*, 57 N.C. App. 305, 308,

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

291 S.E.2d 355, 357 (1982) (explaining that if summons is not issued by the clerk within five days after the filing of the complaint, the action abates).

Because Plaintiff's complaint was filed but proper summons did not issue "within the five days allowed under the rule, the action is deemed never to have commenced." *Williams*, 72 N.C. App. at 157, 323 S.E.2d at 461.

Furthermore, Plaintiff did not apply to the court under Rule 3 requesting permission to file his complaint within 20 days of issuing the summonses on 17 October 2008, and no order granting Plaintiff such permission was entered. Additionally, Plaintiff's complaint, filed 16 February 2009, was not filed within 20 days of the issuance of the summonses on 17 October 2008. Accordingly, Plaintiff did not commence this action against the Defendants by issuance of the 17 October 2008 summonses.

Plaintiff asserts that had he caused new summonses to be issued at the time of the filing of his complaint, his "original action" would have been discontinued and his action would no longer have been filed within the statute of limitations. Plaintiff's argument is misguided. No "original action" was commenced with the issuance of the summonses on 17 October 2008, as explained *supra*. Moreover, had Plaintiff caused new summonses to be issued upon the filing of his complaint, the action would have properly "commenced" within the statute of limitations, as extended to 17 February 2009 by the trial court's Rule 9(j) order.

Plaintiff also argues extensively that he "kept the lawsuit alive" by issuing the *alias* and *pluries* summonses on 29 December 2008, based on the 17 October 2008 summonses, within the 90-day time limit set forth in Rule 4(d).⁴ Plaintiff's argument is again misguided. As explained *supra*, the lawsuit was not commenced with the issuance of the 17 October 2008 summonses and, thus, there was no lawsuit for the *alias* and *pluries* summonses to "ke[ep] alive."

Because the statute of limitations expired the day after Plaintiff filed his complaint, and Plaintiff failed to issue timely summonses to

4. "When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by . . . sue[ing] out an *alias* or *pluries* summons returnable in the same manner as the original process. Such *alias* or *pluries* summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement." N.C. Gen. Stat. § 1A-1, Rule 4(d) (2009).

STINCHCOMB v. PRESBYTERIAN MED. CARE CORP.

[211 N.C. App. 556 (2011)]

Defendants, Plaintiff failed to commence his action against the Defendants within the statute of limitations. Accordingly, the trial court did not err in granting Defendants' motions to dismiss.

3. Motion to Amend Summonses and/or Enlarge Time

[3] Plaintiff next argues that the trial court abused its discretion in denying his Motion to Amend Summonses and/or in the Alternative to Enlarge Time to Issue Summonses. We disagree.

Pursuant to the North Carolina Rules of Civil Procedure, "[a]t any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." N.C. Gen. Stat. § 1A-1, Rule 4(i) (2009). Additionally, "[w]hen . . . an act is required or allowed to be done at or within a specified time, . . . [u]pon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 6(b) (2009). A judgment or order rendered by a trial court in the exercise of a discretionary power is not reviewable on appeal, unless there has been an abuse of discretion on the trial court's part. *State Hwy. Comm'n v. Hemphill*, 269 N.C. 535, 537, 153 S.E.2d 22, 25 (1967). "An abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994).

In this case, had the trial court permitted Plaintiff to issue valid summonses or to amend the void summonses many months after the statute of limitations had expired, Defendants would have been required to defend a lawsuit which otherwise would have expired. "[S]tatutes of limitations[] necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a [statute of limitations] is to have any content, the deadline must be enforced." *United States v. Locke*, 471 U.S. 84, 101, 85 L. Ed. 2d 64, 80 (1985). As Defendants would have suffered material prejudice had the trial court granted Plaintiff's motion or motions, we cannot conclude that the trial court abused its discretion in denying the motions. Plaintiff's argument is overruled.

B. Order Denying Plaintiff's Motion to Stay Proceedings

[4] By his second appeal, Plaintiff contends that the trial court erred in denying his motion to stay proceedings against the Nurse

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

Defendants pending the disposition of his appeal from the dismissal of the other Defendants. In light of our holding *supra*, we need not determine whether Plaintiff's interlocutory appeal is properly before us nor reach the merits of Plaintiff's argument on this issue.⁵

The orders of the trial court are

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

DERWOOD SINK PUCKETT, PLAINTIFF v. NORANDAL USA, INC., EMPLOYER, AND
CIGNA/ACE USA/ESIS, CARRIER, DEFENDANTS

No. COA10-805

(Filed 3 May 2011)

**Workers' Compensation— calculation of accrued interest—
date of initial hearing**

The Industrial Commission erred by denying plaintiff's motion to have the accrued interest related to his workers' compensation benefits calculated from 1 March 2004 instead of 1 May 2006. The initial hearing concerning plaintiff's claim for purposes of N.C.G.S. § 97-86.2 was held on 1 March 2004. The case was remanded to the Commission for further proceedings.

Appeal by plaintiff from Opinion and Award entered 5 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 December 2010.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Harmony Whalen Taylor and M. Duane Jones, for Defendant-appellees.

ERVIN, Judge.

5. We note that although the trial court suggested that Plaintiff move this Court for a writ of *supersedeas* to stay the proceedings against the Nurse Defendants pending the outcome of his appeal from the dismissal of the other Defendants, Plaintiff did not do so.

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

Plaintiff Derwood Sink Puckett appeals from an Opinion and Award entered by the Industrial Commission denying Plaintiff's motion to have the accrued interest relating to his workers' compensation benefits calculated from 1 March 2004 instead of from 1 May 2006. On appeal, Plaintiff argues that a hearing held on 1 March 2004 should be treated as the initial hearing held with respect to his workers' compensation claim for interest-related purposes, so that the amount of interest accrued with respect to his award should be calculated from that date. After careful consideration of Plaintiff's challenge to the Commission's decision in light of the record and the applicable law, we conclude that Plaintiff's argument has merit, that the Commission's order should be reversed, and that this matter should be remanded to the Commission for further proceedings not inconsistent with this opinion.

I. Factual Background

Defendant Norandal USA, Inc., owns and operates an aluminum plant located in Salisbury, North Carolina. Plaintiff worked for Defendant as a maintenance electrician from 1967 to 1998, and then returned to work at Defendant's plant in 2000. On 18 June 2002, Plaintiff filed a claim alleging that he had been exposed to asbestos products while working for Defendant and that he was entitled to receive workers' compensation benefits for asbestosis and asbestos-related pleural disease.

Plaintiff's claim was initially pursued against four insurance carriers, each of whom had provided workers compensation coverage for Defendant during the period of Plaintiff's employment—National Union Fire Insurance Company c/o GAB Robins of North America, Inc.; Argonaut Insurance Company; Royal Sun Alliance; and ACE USA/Cigna. Subsequently, the parties stipulated, with the approval of Deputy Commissioner George T. Glenn II, that Defendant ACE USA/Cigna would be responsible for providing any coverage relating to Plaintiff's claim, leading Plaintiff to dismiss his claim as to National Union, Argonaut, and Royal Sun Alliance.

On 17 April 2003, Plaintiff filed a Form 33 requesting that his claim be assigned for hearing. ACE USA/Cigna filed a Form 61 denying the compensability of Plaintiff's claim on 23 February 2004. On 23 February 2004, Plaintiff filed a motion requesting that Defendants' defenses be stricken as a result of their failure to file a Form 61 within ninety days of the date upon which he filed his claim as required by N.C. Gen. Stat. § 97-18(d). On or around 25 February 2004,

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

Deputy Commissioner Glenn determined that, since Defendants “had not filed a Form 61 within 90 days of the initiation of [P]laintiff’s claim,” they were “barred . . . from disputing the compensability of [Plaintiff’s] claim.”

Plaintiff’s claim came on for hearing before Deputy Commissioner Glenn on 1 March 2004. On 8 March 2005, Deputy Commissioner Glenn entered an Opinion and Award in which he found that neither Defendant had filed a Form 61 denying the compensability of Plaintiff’s claim in a timely manner, that Defendants had failed to properly respond to discovery, and that Plaintiff was entitled to receive workers’ compensation benefits on the grounds that he had established that he was disabled as the result of having contracted an occupational disease. As a result, Deputy Commissioner Glenn awarded Plaintiff compensation for injury to his lungs and pleura, increased this award by 10% because Plaintiff’s injury resulted from “the willful failure of the employer to comply with statutory requirement[s],” and ordered Defendants to pay Plaintiff’s attorney’s fees on the grounds that the “defense of this matter was not based upon reasonable grounds but was based upon stubborn and unfounded litigiousness[.]”

Defendants appealed to the Commission from Deputy Commissioner Glenn’s order. On 12 September 2005, the Commission, by means of an order issued by Commissioner Christopher Scott with the concurrence of Chair Buck Lattimore and Commissioner Pamela T. Young, concluded that “[t]he appealing party has shown good ground to reconsider the evidence in this matter[;]” reversed the “verbal Order by Deputy Commissioner Glenn made on or about February 25, 2004[;]” vacated “the March 8, 2005, Opinion and Award of Deputy Commissioner Glenn[;]” and remanded “the matter . . . to a deputy commissioner for a full evidentiary hearing on all of the issues in this matter.” Although Plaintiff noted an appeal to this Court from the Commission’s order, we dismissed his appeal as having been taken from an unappealable interlocutory order on 10 January 2006.

A consolidated hearing involving this and four other cases was held before Chief Deputy Commissioner Stephen T. Gheen beginning 1 May 2006. In an Opinion and Award filed 12 February 2008, Chief Deputy Commissioner Gheen ruled that Plaintiff had developed asbestosis and asbestos-related pleural disease in the course of his employment with Defendant and was, for that reason, entitled to compensation in the amount of \$20,000.00 per lung, medical expenses, and the “imposition of a 10% penalty for defendant’s willful

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

failure to comply with [OSHA] requirements for extended periods having known of the presence of asbestos that was a risk to the plaintiff and not eliminating plaintiff's exposure, by abatement or providing protective devices[.]" Chief Deputy Commissioner Gheen did, however, reject Plaintiff's claim for attorney's fees. Both parties appealed to the full Commission from Chief Deputy Commissioner Gheen's order. On December 2008, the Commission, by means of an Opinion and Award issued by Commissioner Christopher Scott with the concurrence of Chair Pamela T. Young and Commissioner Buck Lattimore, affirmed Chief Deputy Commissioner Gheen's order "with minor modifications."

After the entry of the Commission's order, Defendants sent Plaintiff a \$44,000 check, with this amount consisting of the compensation award approved by the Commission plus the required 10% penalty, and another check for \$9,479.89, which represented interest on the amount of the Commission's award from 1 May 2006, the date of the hearing conducted by Chief Deputy Commissioner Gheen. On 2 April 2009, Plaintiff filed a motion seeking the payment of additional interest covering the period between the date of the 1 March 2004 hearing before Deputy Commissioner Glenn and the 1 May 2006 hearing before Chief Deputy Commissioner Gheen and the payment of a 10% penalty as a sanction for Defendant's failure to pay the entire amount due in a timely manner. In support of this motion, Plaintiff cited N.C. Gen. Stat. § 97-86.2, which provides, in pertinent part, that:

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in [N.C. Gen. Stat. §] 24-1. . . .

A hearing concerning Plaintiff's motion was conducted before Deputy Commissioner Myra L. Griffin on 10 August 2009. On 30 September 2009, Deputy Commissioner Griffin entered an Opinion and Award denying Plaintiff's motion on the grounds that "the initial hearing took place in this case before Deputy Commissioner Gheen on May 1, 2006." In view of her conclusion that Plaintiff was only entitled to interest from and after 1 May 2006, Deputy Commissioner Griffin did not address or resolve Plaintiff's request for a 10% penalty. Plaintiff appealed to the Commission, which issued an Opinion and

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

Award on 5 April 2010 affirming Deputy Commissioner Griffin's decision "with minor modifications." Plaintiff noted a timely appeal to this Court from the Commission's order.

II. Legal Analysis

On appeal, Plaintiff argues that the Commission erred by concluding that the hearing held before Deputy Commissioner Glenn on 1 March 2004 did not constitute the "initial hearing" concerning Plaintiff's claim for purposes of N.C. Gen. Stat. § 97-86.2. Plaintiff's contention has merit.

In the course of rejecting Plaintiff's request for the payment of additional interest on the principal amount of compensation that he was awarded, the Commission found facts in accordance with the factual summary set forth above and, in addition, found that:

Plaintiff contends that the initial hearing of this claim, for purposes of awarding interest, is the March 1, 2004 hearing before Deputy Commissioner Glenn. However, the Full Commission finds that the March 1, 2004 hearing before Deputy Commissioner Glenn was *not* a hearing on the merits because of Deputy Commissioner Glenn's verbal order barring defendants from disputing the compensability of plaintiff's claim. Moreover, the February 12, 2008 Opinion and Award of Deputy Commissioner Glenn, based upon the proceedings of the March 1, 2004 hearing, was ultimately *vacated* by the Full Commission and, thus, has no effect in law. To award interest from the date of a hearing that was not on the merits, and upon which the Deputy Commissioner's Opinion and Award was ultimately *vacated* would be an abuse of the Commission's discretion. Thus, for purposes of awarding interest in this claim, the Full Commission finds that the initial hearing of this matter took place before Deputy Commissioner Gheen on May 1, 2006, with a full evidentiary hearing on the merits.

In light of these findings of fact, the Commission concluded as a matter of law that "[i]nterest due to [P]laintiff pursuant to the December 5, 2008 Full Commission Opinion and Award shall be calculated from May 1, 2006, the date of the full evidentiary hearing on the merits before Deputy Commissioner Gheen."

As a preliminary matter, we note that, although the Commission characterizes the first of the two statements as a "finding of fact," we believe that it is, in reality, a conclusion of law. "Findings of fact are

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

statements of what happened in space and time.’” *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 130, 560 S.E.2d 374, 380 (2002) (quoting *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987)). “ ‘A ‘conclusion of law’ is a statement of the law arising on the specific facts of a case which determines the issues between the parties. . . . As a general rule[,] . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.’ ” *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (quoting *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999)). “We will review conclusions of law *de novo* regardless of the label applied by the trial court.” *Zimmerman*, 149 N.C. App. at 131, 560 S.E.2d at 380 (citing *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000)). Thus, we will examine *de novo* the correctness of the Commission’s determination, which is reflected in both its findings and conclusions, that the initial hearing held in this case for purposes of N.C. Gen. Stat. § 97-86.2 was the 1 May 2006 hearing held before Chief Deputy Commissioner Gheen rather than the 1 March 2004 hearing held before Deputy Commissioner Glenn.

As we have previously indicated, Plaintiff sought the payment of additional interest pursuant to N.C. Gen. Stat. § 97- 86.2, which provides that, “[i]n any workers’ compensation case in which . . . there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award . . . from the date of the initial hearing on the claim.” In the event that “the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.’” *In re D.L.H.*, 364 N.C. 214, 221, 694 S.E.2d 753, 757 (2010) (citation omitted). We conclude that the relevant portion of N.C. Gen. Stat. § 97-86.2 for purposes of this case, which focuses on “the date of the initial hearing on the claim,” is clear and unambiguous and does not require additional construction.

“[W]ords in a statute are normally given their natural and recognized meanings. . . . ‘Initial’ is defined in Webster’s Third New International Dictionary (1976) to mean ‘of or relating to the beginning; marking the commencement: incipient, first.’ ” *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 55, 56, 332 S.E.2d 67, 73, 74 (1985) (citing *Sheffield v. Consolidated Foods*, 302 N.C. 403, 276 S.E.2d 422

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

(1981)). Thus, N.C. Gen. Stat. § 97-86.2 clearly and unambiguously provides that interest on a workers' compensation award will begin accruing on the date of the first hearing held with respect to a plaintiff's claim. *See Strickland v. Carolina Classic Catfish, Inc.*, 127 N.C. App. 615, 616-17, 492 S.E.2d 362, 363 (1997), *disc. rev. denied*, 347 N.C. 585, 502 S.E.2d 617 (1998) (stating that "[t]he first hearing before the deputy commissioner adjudicating the merits of the employee's claim is the 'initial hearing on the claim' within the meaning of section 97-86.2.>").

The record clearly establishes that, on 1 March 2004, Deputy Commissioner Glenn conducted a hearing concerning Plaintiff's claim for workers' compensation benefits and that he entered an order awarding Plaintiff workers' compensation benefits on 8 March 2005. According to the plain language of the relevant statutory provision, it is clear that the 1 March 2004 hearing was the first hearing on Plaintiff's claim and constituted the "initial hearing" from whose date interest should be calculated for purposes of N.C. Gen. Stat. § 97-86.2 and that the Commission erred by concluding otherwise. In reaching this conclusion, we have considered and rejected each of Defendant's arguments in support of reaching a contrary conclusion.

After the entry of Deputy Commissioner Glenn's order, the Commission reversed his pretrial ruling that Defendants' had waived the right to contest the compensability of Plaintiff's claim, vacated his order, and remanded Plaintiff's claim for a "full evidentiary hearing." In concluding that the hearing held before Deputy Commissioner Glenn was not an initial hearing for purposes of N.C. Gen. Stat. § 97-86.2, the Commission determined that "the March 1, 2004 hearing before Deputy Commissioner Glenn was *not* a hearing on the merits because of Deputy Commissioner Glenn's verbal order barring defendants from disputing the compensability of plaintiff's claim." In an attempt to persuade us to uphold the Commission's decision with respect to the interest issue, Defendant argues that, as the Commission concluded, the 1 March 2004 hearing before Deputy Commissioner Glenn was not a valid "hearing on the merits" because, prior to the hearing, Deputy Commissioner Glenn barred Defendants from contesting the compensability of Plaintiff's claim given their failure to file a Form 61 in a timely manner. We disagree.

The Commission's decision that Deputy Commissioner Glenn's decision depriving Defendants of the ability to present certain defenses or to challenge the compensability of Plaintiff's claim was

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

tantamount to a determination that the hearing held before Deputy Commissioner Glenn did not “count” as an “initial hearing” for purposes of N.C. Gen. Stat. § 97-86.2. In reaching this conclusion, the Commission effectively read into the relevant statutory language a requirement that interest accrues from the date of the initial hearing held for the purpose of addressing the merits of the plaintiff’s claim at which the defendant was allowed to present any and all defenses to the plaintiff’s claim that the Commission ultimately concluded should have been litigated. No such requirement appears anywhere in N.C. Gen. Stat. § 97-86.2, which speaks merely of the “initial hearing,” regardless of whether the decision resulting from that hearing withstands further review. In view of the fact that Deputy Commissioner Glenn’s decision addressed the extent to which Plaintiff was entitled to receive workers’ compensation benefits, it clearly addressed the merits of Plaintiff’s claim, albeit in a legally erroneous way. Simply put, contrary to the Commission’s conclusion and Defendants’ argument, the fact that Deputy Commissioner Glenn erroneously deprived Defendants of the right to raise certain issues does not establish that the hearing which led to the entry of his order did not constitute an initial hearing concerning the merits of Plaintiff’s claim.

Aside from its inconsistency with the relevant statutory language, the Commission’s interpretation of N.C. Gen. Stat. § 97-86.2 effectively defeats the purpose for which that statutory provision was enacted. As this Court has previously noted, “the goals of awarding interest [in connection with a workers’ compensation claim] include the following: ‘(a) To compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement.’” *Childress v. Trion, Inc.*, 125 N.C. App. 588, 592, 481 S.E.2d 697, 699 (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)), *rev. denied*, 346 N.C. 276, 487 S.E.2d 541 (1997). In this case, the Commission vacated the order entered by Deputy Commissioner Glenn stemming from the 1 March 2004 hearing because Deputy Commissioner Glenn erroneously ruled that Defendants were precluded from contesting the compensability of Plaintiff’s claim based on their failure to file a Form 61 in a timely manner. The fact that Deputy Commissioner Glenn’s initial decision was legally erroneous should not, however, obscure the fact that Plaintiff was ultimately determined to be entitled to collect workers’ compensation benefits as the result of his exposure to asbestos in Defendant Norandal’s facility. Given that Plaintiff ultimately pre-

PUCKETT v. NORANDAL USA, INC.

[211 N.C. App. 565 (2011)]

vailed with respect to the compensability issue, the fact that Deputy Commissioner Glenn erroneously deprived Defendants of the right to contest the compensability issue provides no logical basis for failing to “compensate [Plaintiff] for loss of the use value of [his] damage award or compensate[e him] for delay in payment.”

The Commission also concluded that, because Deputy Commissioner Glenn’s decision was “ultimately vacated,” the hearing that led to entry of his order “ha[d] no effect in law” and could not, for that reason, provide an appropriate date upon which to calculate interest with respect to Plaintiff’s claim. Once again, however, acceptance of this argument would be tantamount to the addition of a provision to N.C. Gen. Stat. § 97-86.2 that simply does not appear at that location. Simply put, nothing in the relevant statutory language provides any support for construing N.C. Gen. Stat. § 97-86.2 to mean that interest should be calculated from the date of the “initial hearing the result of which is not subsequently vacated.” Although the Commission did, in fact, vacate Deputy Commissioner Glenn’s decision, its decision to grant Defendants relief from that order does not in any way mean that Deputy Commissioner Glenn’s order was not entered following the initial, or first, hearing concerning the merits of Plaintiff’s claim.

Finally, we note that the Commission also ruled that “[t]o award interest from the date of a hearing that was not on the merits, and upon which the Deputy Commissioner’s Opinion and Award was ultimately vacated would be an abuse of the Commission’s discretion.” By using such language, the Commission seems to suggest that it had a degree of discretion in determining the date upon which the interest calculation should commence. However, N.C. Gen. Stat. § 97-86.2 explicitly provides that, given the presence of the circumstances delineated in the relevant statutory language, the employer or carrier “shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim.” “It is well established that ‘the word ‘shall’ is generally imperative or mandatory.’” *Multiple Claimants v. N.C. Dep’t of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979), and citing *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 269, 513 S.E.2d 782, 784-85 (1999), and *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 255, 382 S.E.2d 745, 749 (1989)). As a result, the Commission is required to determine when the date upon which the interest calculation commences by complying with the applicable statutory language, which does not give the Commission any discretion in making the required

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

determination. Thus, none of the arguments upon which the Commission relied in reaching its decision justify disregarding the plain language of N.C. Gen. Stat. § 97-86.2.

III. Conclusion

Therefore, for the reasons set forth above, we conclude that the “initial hearing” concerning Plaintiff’s claim for purposes of N.C. Gen. Stat. § 97-86.2 was held on 1 March 2004, so that Plaintiff was entitled to receive interest on his award from and after that date. As a result, given that the Commission reached a contrary conclusion, we conclude that the Commission’s order should be, and hereby is, reversed and that this case should be remanded to the Commission for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McGEE concur.

GERHARDA H. SANCHEZ, PETITIONER V. TOWN OF BEAUFORT, BEAUFORT BOARD OF ADJUSTMENT, BEAUFORT HISTORIC PRESERVATION COMMISSION, AND DOUGLAS E. SMITH, RESPONDENTS

No. COA10-750

(Filed 3 May 2011)

1. Standing— challenge—Certificate of Appropriateness—special damages shown

Petitioner established the special damages necessary to confer standing to challenge the Board of Adjustment’s order requiring the Beaufort Historic Preservation Commission to issue a Certificate of Appropriateness to respondent Smith for the structure Smith proposed to build.

2. Administrative Law— Board of Adjustment—Certificate of Appropriateness—height requirement—arbitrary and capricious

The Board of Adjustment did not err by reversing the decision of the Beaufort Historic Preservation Commission (BHPC) and ordering the BHPC to issue respondent Smith a Certificate of Appropriateness for the structure Smith proposed to build. The

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

height requirement imposed by the BHPC was arbitrary and capricious.

3. Administrative Law— Board of Adjustment—Certificate of Appropriateness—denial not based on vistas

Petitioner's argument that the Beaufort Historic Preservation Commission's (BHPC) decision to deny respondent Smith a Certificate of Appropriateness should have been upheld because Smith's application violated BHPC guidelines protecting the historic district's "vistas" was overruled. The BHPC did not reach its decision to deny Smith's application on the basis of any guidelines regulating vistas.

Appeal by petitioner from order entered 24 March 2010 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 1 December 2010.

Harvell and Collins, P.A., by Wesley A. Collins and Russell C. Alexander, for petitioner-appellant.

Kirkman Whitford Brady & Berryman, P.A., by Neil B. Whitford, for respondent-appellee Town of Beaufort.

Poyner Spruill LLP, by Chad W. Essick, for respondent-appellee Douglas E. Smith.

CALABRIA, Judge.

Gerharda H. Sanchez ("petitioner") appeals the superior court's order affirming the decision of the Town of Beaufort ("the Town") Board of Adjustment ("the BOA"). The BOA reversed the decision of the Beaufort Historic Preservation Commission ("the BHPC") and ordered the BHPC to issue a Certificate of Appropriateness ("COA") to respondent Douglas E. Smith ("Smith"). We affirm.

I. Background

Petitioner lives at 117 Front Street, in the historic district of Beaufort, North Carolina. Petitioner's home is located across the street from a property owned by Smith. Smith's property, located at 122 Front Street, contains a sixteen foot, two inch structure known as the "Carpenter Cottage." Smith purchased the property intending to demolish the Carpenter Cottage and construct a two-story structure in its place. In order to commence demolition and construction in the historic district, Smith was required by statute to submit applications

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

for COAs to the BHPC. The BHPC denied three of Smith's applications, and Smith appealed these denials to the BOA. The resulting BOA decisions were then appealed to the Carteret County Superior Court by either Smith or the Town, depending upon which party prevailed before the BOA.

The Carteret County Superior Court ordered Smith and the Town, including two members of the BHPC, to conduct mediation. The mediation was conducted in August 2008, and the parties reached a proposed settlement whereby Smith agreed to submit a new application for a one-and-one-half story structure with the condition that, if the new application was approved by the BHPC, all parties would dismiss any pending litigation. Smith submitted the new COA application, which proposed a one-and-one-half story structure that was twenty-nine feet tall, to the BHPC on 14 March 2009. The new application was considered and discussed at three separate public BHPC hearings, 7 April 2009, 5 May 2009, and 2 June 2009.

At the 7 April 2009 BHPC hearing, Smith explained his proposal to demolish the Carpenter Cottage as well as his construction plans for a new structure on the property. Smith's demolition plan was approved since the Carpenter Cottage was found to be beyond repair. However, petitioner, along with other members of the community, objected to the height of Smith's proposed new construction. Specifically, petitioner objected that the new structure would inhibit her view of Carrot Island and Taylor's Creek from her porch. Petitioner's husband testified that he estimated that the view added approximately \$100,000-\$150,000 of value to petitioner's home. At the conclusion of the hearing, the COA for new construction was tabled so that the BHPC could conduct further research regarding the possibility of building a one-and-one-half story structure at a reduced height.

At the 5 May 2009 hearing, Smith learned the BHPC would issue a COA for the construction of his proposed structure if he reduced the maximum height of the structure to twenty-four feet. On 2 June 2009, Smith presented additional drawings and explained his inability to reduce the height to twenty-four feet. Smith provided computer-aided design drawings that were professionally produced to demonstrate that a height of twenty-seven feet, three inches was the lowest height he would be able to build a structure that could be considered a reasonable use of the property. Smith explained to the BHPC the details regarding the proposed height of the ceilings on the first and second floor, as well as the requirements for the height of the foun-

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

dation to comply with flood safety regulations. Nevertheless, the BHPC voted to deny Smith's application for a COA, because the twenty-seven foot, three inch height was considered non-conforming to the maximum height of twenty-four feet that had been approved at the conclusion of the 5 May 2009 hearing.

Smith appealed the BHPC's decision to the BOA. Smith's appeal was heard at a BOA hearing on 26 October 2009. At the hearing, Smith's counsel and the attorney for the Town addressed Smith's appeal. Petitioner's attorney also attempted to address the BOA, but the Town's attorney advised the BOA that the superior court was the proper forum for any appeals. Consequently, the BOA did not consider the arguments of petitioner's attorney. On 3 December 2009, the BOA entered an order which determined that the BHPC's twenty-four foot height requirement was arbitrary and capricious and remanded Smith's application to the BHPC with instructions to issue Smith a COA. On 15 December 2009, the BHPC voted to issue Smith the COA.

Petitioner filed a petition for a writ of *certiorari* in the Carteret County Superior Court, requesting that the court reverse the decision of the BOA and uphold the BHPC's denial of Smith's COA application. In response to the petition, the Town filed a response which asserted, *inter alia*, that petitioner did not have standing to challenge the BOA's decision. On 24 March 2010, the superior court entered an order affirming the BOA's decision. The superior court's order stated, "the height limitation for the proposed structure of 24 feet was arbitrary and not supported by evidence" and "the proposed structure height of 27 feet, 3 inches is congruous with the structures in the historic district as required by law." Petitioner appeals.

II. Standing

[1] As an initial matter, we address the Town's argument that petitioner's appeal should be dismissed because petitioner lacks standing. While the Town raised this argument before the superior court, it was not explicitly addressed in the court's order affirming the decision of the BOA.¹ Nevertheless, since "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, . . . issues pertaining to standing may be raised for the first time on appeal[.]" *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79 (2002).

"City ordinances creating historic districts, as other ordinances which limit the use of property, are zoning ordinances." *Unruh v.*

1. However, the superior court necessarily concluded that petitioner had standing by hearing the merits of her appeal.

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

City of Asheville, 97 N.C. App. 287, 289, 388 S.E.2d 235, 236 (1990). In the context of zoning ordinance disputes, our Supreme Court has stated:

The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding.

Jackson v. Bd. of Adjust., 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) (internal citations omitted).

Pursuant to N.C. Gen. Stat. § 160A-400.9, a historic preservation commission “shall . . . prepare and adopt principles and guidelines . . . for new construction, alterations, additions, moving and demolition” in the historic district. N.C. Gen. Stat. § 160A-400.9 (c) (2009). Moreover,

no exterior portion of any building or other structure (including masonry walls, fences, light fixtures, steps and pavement, or other appurtenant features) . . . shall be erected, altered, restored, moved, or demolished . . . within [a historic] district until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the preservation commission.

N.C. Gen. Stat. § 160A-400.9 (a) (2009). There is no dispute that, pursuant to N.C. Gen. Stat. § 160A-400.9 (a), Smith must comply with established BHPC guidelines in order to obtain a COA from the BHPC and legally construct a new structure in place of the Carpenter Cottage. Although petitioner alleged that Smith's application did not comply with BHPC guidelines, in order to establish her standing, petitioner still has the burden of demonstrating that she would sustain “‘special damages’ distinct from the rest of the community.” *Heery v. Zoning Bd. of Adjust.*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983).

When making a standing determination, “we view the allegations as true and the supporting record in the light most favorable to the non-moving party.” *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). Petitioner alleged in her petition for writ of *certiorari* that her property was directly across the street

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

from Smith's property. This allegation "in and of itself, is insufficient to grant standing, [but] it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large." *Id.*

Petitioner additionally alleged that the height of Smith's proposed structure did not conform with BHPC guidelines and thus should not have been granted a COA. She also alleged that at its proposed height, Smith's non-conforming structure would interfere with her use of her property by causing her to lose her private waterfront view. Both petitioner and her husband asserted during HPC hearings on Smith's application that the loss of this view would reduce the value of petitioner's property by at least \$100,000. Treating petitioner's allegations as true and viewing the supporting record in the light most favorable to petitioner, she has established the special damages necessary to confer standing to challenge the BOA's decision. Accordingly, we address the merits of petitioner's appeal.

III. Standard of Review

[2] Petitioner argues that the BOA erred by reversing the decision of the BHPC and ordering the BHPC to issue Smith a COA. The review of the BHPC's decision by the BOA, the superior court, and this Court is an appellate review in the nature of *certiorari*. See N.C. Gen. Stat. § 160A-400.9 (e) (2009). A proper *certiorari* review includes:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross examine witnesses, and inspect documents,
- (4) Insuring that decisions of . . . boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Fantasy World, Inc. v. Greensboro Bd. of Adjust., 128 N.C. App. 703, 706-07, 496 S.E.2d 825, 827 (1998) (citation omitted).

III. Congruity

While N.C. Gen. Stat. § 160A-400.9(a) requires the issuance of a COA before construction can occur in a historic district, the statute

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

also limits the discretion of a historic preservation commission in determining whether a COA should issue.

Under N.C.G.S. § 160A-400.9(a), the discretion of the preservation commission is limited: “the commission . . . shall take no action under this section except to prevent the construction . . . which would be *incongruous with the special character of the landmark or district*.” *Id.* (emphasis added). In *A-S-P Associates*, the Court interpreted this phrase to be “a contextual standard.” *A-S-P Associates*, 298 N.C. at 222, 258 S.E.2d at 454. “In this instance the standard of ‘incongruity’ must derive its meaning, if any, from the total physical environment of the Historic District.” *Id.*

Meares v. Town of Beaufort, 193 N.C. App. 96, 101, 667 S.E.2d 239, 242 (2008). In the instant case, the BHPC determined that any structure on Smith’s property over twenty-four feet in height would be incongruous with the historic district,² and thus, denied Smith’s application. On appeal, the BOA determined that this height requirement was arbitrary and capricious. We agree.

“An administrative ruling is deemed arbitrary and capricious when it is whimsical, willful, and an unreasonable action without consideration or in disregard of facts or law or without determining principle.” *Ward v. Inscocoe*, 166 N.C. App. 586, 595, 603 S.E.2d 393, 399 (2004) (internal quotations, citations, and brackets omitted). “[A] determination which is not supported by substantial evidence is an arbitrary decision. A decision which lacks a rational basis—where there is no substantial relationship between the facts disclosed by the record and conclusions reached by the board—is also termed ‘arbitrary.’” *Godfrey v. Zoning Bd. of Adjust.*, 317 N.C. 51, 60, 344 S.E.2d 272, 278 (1986) (internal citations omitted).

In the instant case, the whole record does not contain substantial evidence that would support the BHPC’s determination that Smith’s proposed new construction was not congruous with the rest of the historic district because it exceeded twenty-four feet. While there was evidence presented before the BHPC that there were other one-and-one-half story structures in the historic district that ranged

2. The BHPC did not issue a formal order with findings of fact or conclusions of law. However, the transcript makes clear that the BHPC denied Smith’s application because the proposed construction exceeded the twenty-four foot requirement it had previously established. This is sufficient for appellate review. See *Ballas v. Town of Weaverville*, 121 N.C. App. 346, 350-51, 465 S.E.2d 324, 327 (1996) (“The failure to make findings of fact is not, however, fatal if the record sufficiently informs [the court] of the basis of decision of the material issues[.]” (internal quotation and citation omitted)).

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

between twenty and twenty-two feet in height, there was also evidence presented that the residences closest to the Smith property ranged from twenty-six to thirty-five feet in height. N.C. Gen. Stat. § 160A-400.9 does not permit the BHPC to “cherry pick” certain properties located within the historic district in order to determine the congruity of proposed construction; instead, the BHPC must determine congruity contextually, based upon “the total physical environment of the Historic District.” *Meares*, 193 N.C. App. at 101, 667 S.E.2d at 242 (internal quotation and citation omitted). Since a twenty-four foot maximum height requirement was not supported by the facts disclosed by the record, the decision of the BHPC to deny Smith’s application was arbitrary and cannot stand.

Moreover, it is clear from the transcripts of the BHPC hearings that the BHPC’s twenty-four foot height requirement was not reached on the basis of any particular determining principle. Rather, each BHPC member reached what he or she considered an appropriate height based on their own personal preferences. For example, BHPC member Fred McCune (“McCune”) indicated that he reached the twenty-four foot requirement in the following manner:

I think that five feet (5') could be removed from the project without materially harming the internal design features, and I think that it is important to reduce the height on the south side of Ann Street. I mean Front Street. I think it is a unique area, and it does have a . . . there isn’t much to compare it to, but I think that at twenty-nine foot (29') structure . . .

Chairman Wilson: What are you basing your reduction of five feet (5') on?

[McCune]: Well five feet (5') would be if you had a . . . This is his determination, with a ten foot (10') ceiling downstairs, and a nine foot (9') ceiling upstairs, if you had eight foot (8') ceilings, that’s three feet (3').

. . .

And then, if the duct work was to be relocated, that’s two more feet. So that would be five feet (5') without a lot of material changes. *Now it could be a different number, but I’m just throwing that out.*

(Emphasis added). Similarly, BHPC member Dan Krautheim (“Krautheim”) made his own calculations on how the interior of Smith’s structure could be configured so that it could reach a height of “twenty two and a half or twenty four” feet. BHPC member Les

SANCHEZ v. TOWN OF BEAUFORT

[211 N.C. App. 574 (2011)]

Sadler (“Sadler”) simply stated that “twenty five feet (25’) is a reasonable height.” When the twenty-four foot requirement was put to a vote by the BHPC, Krautheim explicitly admitted that none of the BHPC guidelines were used to determine that height. Since the twenty-four foot height requirement was established by each member of the BHPC without the use of any determining principle from the BHPC guidelines, it was clearly arbitrary. Petitioner’s arguments to the contrary are overruled.

V. Vista

[3] Petitioner additionally argues that the BHPC’s decision should have been upheld because Smith’s application violated BHPC guidelines protecting the historic district’s “vistas.” However, the record clearly indicates that the BHPC did not reach its decision to deny Smith’s application on the basis of any guidelines regulating vistas. During one of the meetings, BHPC members Krautheim and Sadler engaged in the following dialogue:

[Krautheim]: We see the impact of the vista³ on twenty two feet (22’). So you know you’re going to lose that.

[Sadler]: That vista is gone.

[Krautheim]: It’s gone, let’s face it. The only way it’s going to stay there is if he builds an eighteen foot (18’) structure. And you’re still losing some of it.

As the BHPC continued to deliberate, BHPC Chairman Mamre Wilson reiterated that “anything above sixteen feet, two inches is going to obstruct the view.” Thus, the BHPC believed that any protected vista would be obstructed once a structure over sixteen feet, two inches was constructed. Since the BHPC was willing to allow Smith to construct a structure that was twenty-four feet in height, which was almost eight feet higher than sixteen feet, two inches, it could not have denied Smith’s subsequent COA application on the grounds of any vista protections. Consequently, the BHPC’s decision cannot be upheld on this basis. This argument is overruled.

V. Conclusion

Treating petitioner’s allegations as true and viewing the record in the light most favorable to petitioner, she established standing to

3. The vista discussed by the BHPC members referred to the view of the general public from the street level on Front Street. The lost “vista” which petitioner alleged damaged the value of her property was a private vista from a porch located on her property.

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

challenge the decision of the BOA. The BHPC's twenty-four foot height requirement for Smith's COA application was not supported by the facts disclosed by the whole record and was made without the use of any determining principle. Therefore, the BOA correctly reversed the BHPC's arbitrary decision and ordered the BHPC to issue a COA to Smith. The decision of the superior court, affirming the decision of the BOA, is affirmed.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

STATE OF NORTH CAROLINA v. JEREMIE LABRANDON STEVENSON

No. COA10-1313

(Filed 3 May 2011)

1. Admission of evidence of guns—no plain error

The trial court did not commit plain error in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by admitting evidence of guns found by law enforcement officers during the search of defendant's family residence. Even assuming the admission of the evidence of the guns was error, defendant fell far short of convincing the Court of Appeals that a different outcome would have resulted absent the alleged error.

2. Evidence—first-degree murder—first-degree kidnapping—robbery with a firearm—admission of photograph—illustrative of witness's testimony—no unfair prejudice

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by admitting into evidence a picture of defendant holding a firearm. The photograph clearly illustrated the witness's testimony, and the trial court appropriately allowed the photograph into evidence for that purpose. Furthermore, the relevance of the picture was not substantially outweighed by the unfair prejudice to defendant.

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

3. Request for transcript—trial court's denial—no abuse of discretion

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by failing to meaningfully evaluate and exercise its discretion with respect to the jury's request for a transcript of a witness's trial testimony. By summoning the jurors and exercising its discretion regarding the jury's request, the trial court in this case complied with the requirements of N.C.G.S. § 15A-1233.

4. Admission of witness's prior statement—failure to show prejudice

The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by allowing a witness to read to the jury a portion of her prior statement to police. Assuming *arguendo* that it was error for the trial court to admit the statement, defendant failed to satisfy his burden in showing that he was prejudiced by the alleged error.

Appeal by Defendant from judgment dated 21 December 2009 by Judge Jerry Cash Martin in Iredell County Superior Court. Heard in the Court of Appeals 22 March 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Paul F. Herzog for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

On 24 March 2008, Defendant Jeremie LaBrandon Stevenson ("Stevenson") was indicted on one count each of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Stevenson pled not guilty to the charges and was tried non-capitally before a jury at the 14 December 2009 Criminal Session of Iredell County Superior Court, the Honorable Jerry Cash Martin presiding.

The evidence presented at trial tended to show the following: In the evening of 2 March 2008, Theodore Barbone ("Barbone"), a reputed

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

drug dealer and the victim in this case, was driven by two friends to Daughtry Lane near Statesville, North Carolina, so that Barbone could “drop some [marijuana] off.” When the three arrived, Barbone got out of his vehicle and got into the back seat of “an old red four-door car[,]” in which Barbone’s friends observed two men sitting in the front seats. As soon as Barbone got into the red car, the car sped off; Barbone’s two friends followed. When Barbone’s friends caught up with the red car, they saw the red car’s front seat passenger struggling with Barbone and then heard two gunshots come from the direction of the red car. Immediately thereafter, when a third car pulled up behind them, Barbone’s friends drove away from the red car. The third car followed Barbone’s friends for several miles before it “turned around and came back the same way they just came from.” After the third car turned around, Barbone’s friends called the Iredell County sheriff’s office and “told them that [they] thought there had been a shooting[.]” Barbone’s friends then returned to the location of the shooting, where they met law enforcement officers and gave statements detailing the events of the evening.

Prior to Barbone’s friends’ return to the scene of the shooting, a truck driver came upon Barbone lying face down in the middle of Cool Springs Road in Iredell County. The truck driver saw that Barbone was bleeding, but still breathing and called 911 to report a hit-and-run. When law enforcement and emergency medical personnel arrived, Barbone was lying bloody in the middle of the road and no longer breathing. Barbone was also missing a shoe and had two fresh wounds in his torso. A later post-mortem examination revealed that Barbone died from internal bleeding associated with two close-range gunshot wounds to the abdomen.

Through their investigation of Barbone’s death, law enforcement officers discovered that Barbone planned to meet and sell marijuana to Josh Hemphill (“Hemphill”) on the night Barbone was shot. Law enforcement officers learned that Hemphill, along with Stevenson and two others, were at an apartment rented by Crystal Waugh (“Waugh”) and Kayla Robinson (“Robinson”) in the late evening of 2 March 2008 and that Stevenson was at Waugh’s and Robinson’s apartment earlier that day with a “silver gun with a black handle” in his lap. Officers also located a red car registered to Stevenson abandoned behind a house near Stevenson’s home. Officers impounded and searched Stevenson’s car and found a shoe matching the one on Barbone’s foot when he died and blood stains with DNA matching that of Barbone. Officers then obtained and executed a search warrant for Stevenson’s residence and arrested Stevenson at his residence.

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

On the following day, Stevenson gave a statement to police indicating that Hemphill asked Stevenson to drive Hemphill to meet Barbone so Hemphill could buy some marijuana. Stevenson stated that after Barbone got into the car with Hemphill and Stevenson, Hemphill pulled out a gun and demanded Barbone's marijuana. A struggle for the gun ensued, and Barbone was shot. Stevenson stopped the car, Barbone got out, and Hemphill shot at him again.

Later, while he was still in custody, Stevenson gave another statement, in which he confirmed he was driving the car when Hemphill shot Barbone, but further indicated that, rather than attempting to buy drugs from Barbone, he and Hemphill "planned to rob [Barbone] for his [marijuana]" on the night of the shooting.

Following the presentation of evidence, the trial court instructed the jury on the charges of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first- and second-degree kidnapping, and first- and second-degree murder. The jury returned verdicts finding Stevenson guilty of first-degree murder based on the felony murder rule, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm. The trial court arrested judgment on the first-degree kidnapping and robbery with a dangerous weapon charges, consolidated the other two judgments, and sentenced Stevenson to life imprisonment without parole. Stevenson gave notice of appeal in open court.

Discussion

[1] On appeal, Stevenson argues that the trial court erred by admitting evidence of guns found by law enforcement officers during the search of Stevenson's family residence. Stevenson contends that the evidence was irrelevant and highly prejudicial and, thus, should not have been admitted by the trial court.

The evidence of which Stevenson complains includes a photograph of three guns found in Stevenson's residence, where he lived with his parents, and testimony about how and where the guns were found. Stevenson contends that this evidence should not have been admitted because (1) the guns were found under a mattress in a bedroom that was not Stevenson's room, and (2) investigators concluded that the guns were not possible murder weapons in this case. However, as conceded by Stevenson on appeal, the evidence of the guns was admitted without objection by Stevenson and, thus, our review of this issue may only be for plain error. N.C. R. App. P. 10(a)(4) (2009).

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

To show plain error, a defendant must convince the Court “not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282 (internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). In this case, assuming the admission of the evidence of the guns was error, Stevenson has fallen far short of convincing this Court that a different outcome would have resulted absent the alleged error.

The largely undisputed evidence presented at trial tended to show that Stevenson admitted in a written statement that he and Hemphill met Barbone in order to rob Barbone; that Stevenson admitted that he knew Hemphill had a gun at the ready when Barbone got into Stevenson’s car; that Stevenson admitted to driving away from Barbone’s friends when Barbone got in the car; that Stevenson’s statement was corroborated by testimony from Barbone’s two friends, who testified that Barbone got into a red car similar to Stevenson’s; and that Stevenson’s car had Barbone’s shoe and blood in it.

Despite this *overwhelming* evidence of his guilt, Stevenson argues on appeal that this case was not a “slam dunk” and that admission of the evidence of the three guns was “a basic fundamental error entitling him to a new trial.” In support of this argument, Stevenson contends that “[t]he fact that the jurors asked for access to documentary evidence, didn’t arrive at a quick verdict, and announced that they were deadlocked on one of the charges[] tends to indicate that the jurors found the State’s case less than compelling.” We are unconvinced.

First, we note that the evidence of the guns was not among the evidence that the jury asked to review. Second, regarding the time taken by the jury to reach its verdict, rather than the jurors deliberating “for the better part of two days” as Stevenson contends, the transcript indicates that the jurors deliberated for less than six and one half hours. Third, regarding the jury’s deadlock, the transcript indicates that after five hours of deliberation, the jurors had reached unanimous verdicts on the charges of first-degree kidnapping, conspiracy to commit robbery with a firearm, and robbery with a firearm, but were deadlocked at 11 to one on the charge of first-degree murder.

In our view, these circumstances do not indicate that the jurors found the State’s evidence “less than compelling.” Instead, they tend to indicate that the jury returned verdicts finding Stevenson guilty after meaningful, but relatively brief, consideration of the State’s evidence. Considering the plenary evidence of Stevenson’s guilt, the cir-

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

cumstances offered by Stevenson, while perhaps showing the State's case was not a "slam dunk," show that, at the very least, the State's case was an uncontested lay-up. Stevenson's argument is overruled.

[2] Stevenson next argues that the trial court erred by admitting a picture of Stevenson holding a firearm. We disagree. The complained-of evidence was a properly authenticated picture of Stevenson lying down with a silver revolver on his chest. The picture was offered by the State and admitted by the trial court to illustrate Robinson's testimony that she saw Stevenson at her apartment with a silver gun with a black handle. Indeed, just before the trial court received the picture into evidence, Robinson testified that the gun depicted in the picture "appears to be the same firearm that [she] last saw . . . in [Stevenson's] lap on the day that [Barbone] was shot."

As correctly stated by the State on appeal, "[w]here a proper foundation has been laid, photographs may be used contemporaneously with the witness's testimony in order to illustrate his testimony and facilitate his explanation." *State v. Swift*, 290 N.C. 383, 395, 226 S.E.2d 652, 662 (1976). In this case, the photograph clearly illustrated Robinson's testimony, and the trial court appropriately allowed the photograph into evidence for that purpose.¹ Nevertheless, Stevenson argues that the picture was inadmissible under North Carolina Rule of Evidence 403 because any relevance of the picture was substantially outweighed by the unfair prejudice to Stevenson caused by the fact that, in the picture, he was making what Stevenson characterizes as a "gang sign." We are again unpersuaded.

Before allowing the picture into evidence, the trial court explained the basis for its ruling as follows:

The [c]ourt's of the view that [the picture's] probative value is not substantially outweighed by its [] unfair prejudice to [Stevenson] as to the hand gesture. It's a hand gesture with no particular significance. The officer [who found the picture and testified in *voir dire* that the gesture was "some kind of gang sign, but I couldn't tell you exactly what it is"] speculated. He thought it may have some gang significance but nothing else in the picture, not even a hand gesture by itself[,] indicates that.

1. On appeal, Stevenson seems to argue that the picture was admitted as substantive evidence and that such admission was erroneous due to the picture's irrelevance, rather than arguing that it was inadmissible to illustrate Robinson's evidence, the purpose for which it was admitted by the trial court. To the extent Robinson's argument addresses the admissibility of the picture as substantive evidence, that argument is overruled as the picture was plainly not admitted for substantive purposes.

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

On appeal, this Court reviews a trial court's ruling under Rule 403 for abuse of discretion. *See State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) ("The decision whether to exclude evidence under Rule 403 of the Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion."), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). In this case, because there was no evidence that Stevenson's hand gesture was a "gang sign," and because there was no evidence to indicate any affiliation between Stevenson and any kind of gang, we conclude that the trial court did not abuse its discretion in ruling that the picture's probative value was not substantially outweighed by any potential unfair prejudice to Stevenson, especially in light of the picture's strong probative value in illustrating Robinson's testimony. Accordingly, Stevenson's argument is overruled.

[3] Stevenson next argues that the trial court erred "when it failed to meaningfully evaluate and exercise its discretion with respect to the jury's request for a transcript of Alisha Hemphill's trial testimony" in violation of N.C. Gen. Stat. § 15A-1233. We disagree.

Section 15A-1233 provides as follows:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

N.C. Gen. Stat. § 15A-1233(a) (2009).

In this case, after less than 30 minutes of deliberation, the jurors requested to review Stevenson's written statements, Waugh's and Robinson's written statements, photographs of the crime scene and Stevenson's car, and a copy of the testimony of Alisha Hemphill, Hemphill's sister. Upon receipt of the request, the trial court granted all of the jury's requests except for the copy of Alisha Hemphill's testimony, which the court "propose[d] in its discretion to deny that request." Neither party objected to the court's decision on any of the jury's requests, and the trial court informed the jury that "[i]n the [c]ourt's discretion, the [c]ourt will deny that portion of—deny [the copy of Alisha Hemphill's transcript] request[,] but that the court would grant the rest of the requests.

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

Stevenson argues on appeal that the trial court “failed to give any meaningful consideration to the jurors’ request” based on the lack of “evidence that [the court] weighed the pros and cons of the issue.” Stevenson further argues that “the trial judge should give some sort of explanation to demonstrate that he is actually exercising his discretion[.]” These arguments are unavailing.

As previously stated by our Supreme Court in *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985):

This statute [section 15A-1233] imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue.

Id. at 34, 331 S.E.2d at 656. By summoning the jurors and exercising its discretion regarding the jury’s requests, the trial court in this case complied with the requirements of section 15A-1233. Despite Stevenson’s contention otherwise, there is nothing to indicate that the trial court failed to give meaningful consideration to the request, and there is no requirement that the judge “give some sort of explanation to demonstrate that he is actually exercising his discretion[.]”² Furthermore, “when a trial court assigns no reason for a ruling which is to be made as a matter of discretion, the reviewing court on appeal presumes that the trial court exercised its discretion.” *State v. Guevara*, 349 N.C. 243, 252, 506 S.E.2d 711, 717 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). Based on the foregoing, we conclude that the trial court’s denial of the jury’s request to review Alisha Hemphill’s testimony was not error.

[4] Finally, Stevenson argues that the trial court erred by allowing Robinson to read to the jury the following portion of her prior statement to police:

After I heard about [Stevenson] being arrested, me and [Waugh] started talking. We was wondering why [Stevenson and another

2. In arguing for the existence of this requirement, Stevenson cites various cases from other jurisdictions standing for the proposition that the trial court should generally grant these requests. Because those cases are not binding, and because the North Carolina legislature has not amended section 15A-1233 to include language favoring granting such requests, we decline to adopt the rules from other jurisdictions and, instead, apply North Carolina law as written.

STATE v. STEVENSON

[211 N.C. App. 583 (2011)]

person] came in and took a shower that night, ‘cause that’s not normal. We was wondering why they didn’t have the gun like normal. Usually over the last couple of weeks, I would see [] them with a gun.

Robinson’s prior statement was admitted by the trial court as opinion-based evidence of Robinson’s state of mind at the time Stevenson returned to Robinson’s and Vaughn’s apartment.

On appeal, Stevenson argues that the evidence was improperly admitted because it was not proper opinion testimony and because it was inadmissible non-corroborative hearsay. Stevenson further argues that admission of the evidence of Robinson’s “speculation about [Stevenson’s] motive for taking a shower and the reason for the absence of the gun” was clearly prejudicial in that “[h]ad the trial court not admitted [Robinson’s] out-of-court statements, there is a reasonable possibility that the jury would have reached a different verdict.” We disagree.

Assuming *arguendo* that it was error for the trial court to admit Robinson’s statement, we conclude that Stevenson has failed to satisfy his burden in showing that he was prejudiced by the alleged error. See N.C. Gen. Stat. § 15A-1443(a) (2009) (“A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.”). As discussed *supra*, the evidence of Stevenson’s guilt was overwhelming. This is so despite the allegedly erroneous admission of Robinson’s statement that Stevenson’s shower and lack of possession of a gun were inconsistent with his normal routine. Based on the overwhelming evidence against Stevenson, we conclude there is no reasonable possibility that the jury would have reached a different result had Robinson’s statement been excluded. Accordingly, Stevenson’s argument is overruled.

We hold that Stevenson received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Judges HUNTER, ROBERT C., and ERVIN concur.

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

B. KELLEY ENTERPRISES, INC., PLAINTIFF-APPELLANT v. VITACOST.COM, INC.,
DEFENDANT-APPELLEE

No. COA10-645

(Filed 3 May 2011)

Process and Service— Florida law—improper service—lack of personal jurisdiction—no res judicata or collateral estoppel effect on North Carolina action

The trial court erred by granting defendant's motion for judgment on the pleadings because a Florida court lacked personal jurisdiction over plaintiff in the Florida action. Defendant never properly served plaintiff with process, and therefore, the Florida court's judgment had no *res judicata* or collateral estoppel effect on plaintiff's North Carolina action.

Appeal by Plaintiff from order entered 8 March 2010 by Judge Catherine C. Eagles in Superior Court, Forsyth County. Heard in the Court of Appeals 15 November 2010.

Carruthers & Roth, P.A., by Rachel Scott Decker and Kevin A. Rust, for Plaintiff-Appellant.

Bell, Davis & Pitt, P.A., by Bradley C. Friesen, for Defendant-Appellee.

McGEE, Judge.

B. Kelley Enterprises, Inc. (Plaintiff) filed a complaint on 18 February 2009 against Vitacost.com, Inc. (Defendant), seeking to collect money due under a rental agreement. Plaintiff also sought to recover late fees, interest, attorneys' fees, and costs. Defendant filed an answer in which it pleaded, *inter alia*, the defenses of *res judicata* and collateral estoppel. Defendant contended that the matters in dispute had already been determined in an earlier action filed by Defendant, in which Defendant had been granted default judgment against Plaintiff. In the present case, Defendant filed a motion for judgment on the pleadings, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), on 3 February 2010. In an order entered 8 March 2010, the trial court granted Defendant's motion. Plaintiff appeals.

Plaintiff alleged in its complaint that Plaintiff and Defendant entered into an agreement on or about 11 August 2008, whereby Defendant agreed to lease certain equipment and purchase certain

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

supplies from Plaintiff for a period of sixty months. Defendant failed to purchase the agreed upon minimum amount of supplies for the month of February 2009. Plaintiff “accelerated the rental payments under the Rental Agreement as provided therein” and filed its complaint on 18 February 2009.

I. The Florida Action

The fundamental issue in this case involves a judgment in a lawsuit filed by Defendant against Plaintiff in Palm Beach County, Florida (the Florida action). We note that Defendant’s complaint is file-stamped 2 February 2009, but is dated 4 February 2009 and, in its brief, Defendant states that it “sued” Plaintiff on 5 February 2009. In the Florida action, Defendant sought, *inter alia*, cancellation of the rental agreement, as well as damages based on alleged defects in the equipment provided to Defendant by Plaintiff. In the present case, Defendant attached to its answer a “return of service” of a summons from the Florida action, signed by a “NC Process Server.” The process server attested that he served Plaintiff “in compliance with Florida Statute 48.031 or other state statute as applicable.” A deputy clerk of Palm Beach County, Florida entered a default on 16 March 2009. “[A]fter entry of default against [Plaintiff][,]” a judge of the Florida Circuit Court entered a “Final Judgment” on 6 April 2009.

II. Service of Process

Plaintiff first argues that the trial court in the action before us erred in granting Defendant’s motion for judgment on the pleadings because the Florida court lacked personal jurisdiction over Plaintiff in the Florida action. Plaintiff contends that Defendant never properly served Plaintiff with process and, therefore, the Florida court’s judgment “would have no res judicata effect on the action brought by Plaintiff in North Carolina.” We agree.

“This Court reviews a trial court’s grant of a motion for judgment on the pleadings *de novo*.” *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008). “A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *Id.* at 761, 659 S.E.2d at 767.

Our Supreme Court summarized the doctrines of *res judicata* and collateral estoppel in *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986).

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

Thus, under *res judicata* as traditionally applied, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have “merged” with the judgment; where defendant prevails, the judgment “bars” the plaintiff from further litigation. In either situation, all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded. Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. Traditionally, courts limited the application of both doctrines to parties or those in privity with them by requiring so-called “mutuality of estoppel”: both parties had to be bound by the prior judgment.

Id. at 428-29, 439 S.E.2d at 556-57 (internal citations omitted).

In a dissenting opinion adopted *per curiam* by our Supreme Court, Judge Steelman stated: “For either doctrine to apply, the prior action must have been a final judgment on the merits in a court of competent jurisdiction.” *Sawyers v. Farm Bureau Ins. of N.C., Inc.*, 170 N.C. App. 17, 30, 612 S.E.2d 184, 193 (Stelman, J. dissenting), *rev’d per curiam for reasons stated in the dissent*, 360 N.C. 158, 622 S.E.2d 490 (2005). “A judgment by default is a final judgment[.]” *Moore v. Sullivan*, 123 N.C. App. 647, 649, 473 S.E.2d 659, 660 (1996). However, “absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.” *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998). Thus, in determining whether judgment on the pleadings was proper in the present case based on *res judicata* and collateral estoppel, we must determine whether the judgment in the Florida action was a final judgment and whether it was entered by a court of competent jurisdiction.

“The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit.” *Gardner v. Tallmadge*, — N.C. App. —, —, 700 S.E.2d 755, 759 (2010), *aff’d* — N.C. —, — S.E.2d — (2011). “However, a judgment of a court of another state may be attacked in North Carolina, but only upon the grounds of lack of jurisdiction,

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

fraud in the procurement, or as being against public policy.” *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969).

Defendant argues that Plaintiff failed to properly challenge personal jurisdiction in the action before us, because Plaintiff’s complaint in the present case contains no allegations concerning the Florida action. Defendant also contends that it satisfied its burden of showing that the Florida judgment was authentic and that Plaintiff failed to satisfy its burden “to bring forward evidence to rebut the presumption of full faith and credit.” However, we note that Defendant filed a motion for judgment on the pleadings in the present case. “[B]urdens of proof have no place in a motion for judgment on the pleadings, a motion which is ruled upon in the absence of any evidence[.]” *Benson v. Barefoot*, 148 N.C. App. 394, 396, 559 S.E.2d 244, 246 (2002).

As stated above, in determining whether *res judicata* and collateral estoppel warrant a judgment on the pleadings, a trial court must first determine whether the prior action resulted in a final judgment by a court of competent jurisdiction. “Only the pleadings and exhibits which are attached and incorporated into the pleadings may be considered by the trial court.” *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996). Thus, the trial court in the present case was required to make its determination based solely on the pleadings and on Defendant’s answer, which included copies of the record in the Florida action.

Plaintiff does not argue that the Florida judgment was not a final judgment. Rather, Plaintiff contends that, because of improper service, the Palm Beach County Circuit Court lacked jurisdiction over Plaintiff. Plaintiff also contends that service in the present case was improper under North Carolina law because Plaintiff was served by a private process server, and not by the Forsyth County Sheriff’s Office. Defendant counters that Florida’s law regarding service of process controls, and that service in the Florida action was proper under Florida law.

We must first determine whether North Carolina law or Florida law controlled when service was attempted in the Florida action.

Substantive questions of law ‘are controlled by the law of the place—the *lex loci*; whereas matters of procedure are controlled by the law of the forum—the *lex fori*.’ Although North Carolina is the forum for the current suit, the validity of the judgment to bar

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

the current action must be reviewed according to the laws of [Florida].

Freeman v. Pacific Life Ins. Co., 156 N.C. App. 583, 587, 577 S.E.2d 184, 187 (2003) (internal citation omitted). Thus, Florida's rules of procedure are controlling.

Under Florida law, service of process on persons located outside of Florida is governed by Fla. Stat. § 48.194, which states: "Except as otherwise provided herein, service of process on persons outside of this state shall be made in the same manner as service within this state by any officer authorized to serve process in the state where the person is served." Fla. Stat. Ann. § 48.194(1) (West 2006). Our Court, in *Russ v. Russ*, 50 N.C. App. 553, 274 S.E.2d 259 (1981), previously interpreted Florida's service of process statutes. In *Russ*, the plaintiff sought to enforce a default judgment entered by a Florida court that granted the plaintiff alimony. *Id.* at 553, 274 S.E.2d at 260. A North Carolina trial court ruled that the Florida judgment was entitled to full faith and credit; however, our Court reversed, holding that service in the original action was improper. *Id.* The defendant in *Russ* was served in North Carolina by a postal official, as evidenced by a return receipt signed at the defendant's house by his stepdaughter. *Id.* In determining whether this service was sufficient to grant the Florida court personal jurisdiction over the defendant, we conducted the following analysis:

An examination of Florida law reveals that Fla. Stat. § 48.193, that state's long-arm statute, gives Florida jurisdiction, with respect to proceedings for alimony or child support, over any person who resided in the state before or at the time of the commencement of the action. Fla. Stat. § 48.194 governs service of process upon out-of-state defendants in cases such as the one *sub judice*. The statute allows service of process by "any officer authorized to serve process in the state where the person is served" in the same manner as service within Florida could be accomplished.

Service within Florida is governed, for our purposes, by two statutes. Fla. Stat. § 48.021(1) provides, in pertinent part, that "(a)ll process shall be served by the sheriff of the county where the person to be served is found . . ." § 48.031 goes on from there; and in 1977, when service was made, provided that service could be completed by "delivering a copy of it to the person to be served . . . or by leaving the copies at his usual place of abode with some person of the family who is 15 years of age or older and informing the person of their contents."

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

Upon examination of the statutes cited above, it appears to this Court that Florida requires service of process within the state to be by the county sheriff or special process server appointed by the county sheriff. Florida carries this requirement over to service of process outside the state, except in certain enumerated situations, by requiring that out-of-state defendants be served by officers rather than postal officials.

Russ, 50 N.C. App. at 554, 274 S.E.2d at 260.

We also find guidance in Florida's judicial interpretations of its service of process requirements. In *Takiff By And Through Stateman v. Takiff*, 683 So. 2d 595 (Fla. Dist. Ct. App. 1996), the Florida District Court of Appeal addressed whether out-of-state service had been properly effectuated in Illinois. In *Takiff*, the plaintiff had filed for dissolution of marriage against her husband, the defendant. *Id.* at 596. The defendant lived in Cook County, Illinois, and was served there by a "process server specifically appointed by the Dade [County, Florida] Circuit Court." *Id.* In determining that service was proper, the Florida District Court of Appeal conducted the following analysis:

Under Illinois law, in Cook County, which has a population of over one million, process must be served "either by a sheriff or by a disinterested person appointed by the court." Ill.Rev.Stat. ch. 110, para. 2-202(a) (1985). The husband successfully argued below that the "court" referred to in that Illinois statute must be an Illinois court. We disagree, and hold that the service in Illinois, concededly performed by a disinterested person, was sufficient. The Dade County Circuit Court had specially appointed the Illinois private investigator to serve the husband, and thus complied with both Florida and Illinois statutory requirements.

Id.; see also *Thompson v. King*, 523 F. Supp. 180, 183 (M.D. Fla. 1981) ("3. Defendant King was personally served in the manner prescribed by Fed.R.Civ.P. 4(d)(1), which parallels the manner of in-state service upon an individual prescribed by Florida law. 4. The Deputy United States Marshal who served King was authorized to serve process within the state of South Carolina. It logically follows from these facts that the manner of effecting service upon the defendant herein was proper.").

Therefore, it appears that Florida's statutes governing service of process require out-of-state service to be carried out by persons

B. KELLEY ENTERS., INC. v. VITACOST.COM, INC.

[211 N.C. App. 592 (2011)]

authorized to conduct such service by the laws of the state where the service will occur. N.C. Gen. Stat. § 1A-1, Rule 4(a) (2009), which governs service of process within North Carolina, states that the “proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.” N.C.G.S. § 1A-1, Rule 4(h) further provides:

When proper officer not available.—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

Service must generally be carried out by the sheriff of the county where service is to occur. While the clerk of the issuing court may appoint an alternative person to carry out service, that “[c]lerk is not required or authorized to appoint a private process server as long as the sheriff is not careless in executing process.” *Williams v. Williams*, 113 N.C. App. 226, 229-30, 437 S.E.2d 884, 887 (1994) *aff’d*, 339 N.C. 608, 453 S.E.2d 165 (1995).

There is no evidence in the record that the Clerk of Court for Palm Beach County appointed the process server used in the present case; nor is there any evidence that such an appointment would have been justified by neglect of the sheriff. Rather, the summons was directed to the attention of: “All and Singular the Sheriffs of the State.” Thus, in the Florida action, service of process should have been carried out by the Sheriff of Forsyth County—the sheriff in the county where Plaintiff was to be served. Because service of process was not properly executed, the Palm Beach County Circuit Court was not a court of “competent jurisdiction.” *See Fender*, 130 N.C. App. at 659, 503 S.E.2d at 708. Therefore, the doctrines of *res judicata* and collateral estoppel do not make the Florida judgment a bar to Plaintiff’s complaint. *Sawyers*, 170 N.C. App. at 31, 612 S.E.2d at 194 (Steelman, J. dissenting). We must therefore reverse the trial court’s order granting judgment on the pleadings in this action.

STATE v. GREEN

[211 N.C. App. 599 (2011)]

Reversed and remanded.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA v. DEREK RILE GREEN

No. COA10-1163

(Filed 3 May 2011)

**Satellite-based Monitoring— highest level of supervision—
sufficiency of additional findings**

The Court of Appeals granted defendant's petition for writ of *certiorari* under N.C. R. App. P. 21 and concluded that the trial court did not err by enrolling defendant in the satellite-based program for a period of five years. The trial court's additional findings that defendant had not received treatment and that the victims were very young were proper findings to support the trial court's determination that defendant required the highest possible level of supervision.

Appeal by Defendant from order dated 11 February 2010 by Judge R. Allen Baddour, Jr., in Chatham County Superior Court. Heard in the Court of Appeals 22 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Oliver G. Wheeler IV, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

On 9 January 2007, Derek Rile Green ("Green") was indicted on one count of first-degree forcible sexual offense. Prior to trial, the State filed an information with the Chatham County Superior Court charging Green with indecent liberties with a minor.

Pursuant to a plea agreement, Green pled guilty at the 24 April 2008 Criminal Session of Chatham County Superior Court, the Honorable R. Allen Baddour, Jr., presiding, to two counts of taking indecent liberties with a minor in exchange for the State's agreement to drop several other pending charges. As recommended in Green's

STATE v. GREEN

[211 N.C. App. 599 (2011)]

plea agreement, the trial court sentenced Green to 25 to 30 months in the custody of the Department of Correction (“DOC”) and further recommended that Green complete the “SOAR” program.¹ At the conclusion of sentencing, the trial court conducted a hearing pursuant to N.C. Gen. Stat. § 14-208.40A to determine Green’s eligibility for enrollment in a satellite-based monitoring (“SBM”) program. The hearing was continued for 21 months to allow the parties to gather further evidence.

On 13 October 2009, a DOC risk assessment² of Green was completed by psychologist Richard Daves. The risk assessment placed Green in the “moderate-low” risk range.

The SBM hearing was completed on 11 February 2010, Judge Baddour again presiding. Following that hearing, the trial court entered its “judicial findings and order for sex offenders,” in which the court (1) found that Green was convicted of an offense involving the physical, mental, or sexual abuse of a minor, (2) found that Green requires the highest possible level of supervision and monitoring, and (3) ordered that, upon his release from prison, Green be enrolled in SBM for a period of five years pursuant to N.C. Gen. Stat. § 14-208.40A(e). From the SBM order, Green appeals.

Grounds for Appellate Review

At the 11 February 2010 SBM hearing, Green gave oral notice of appeal from the order. However, this Court has held that “SBM hearings and proceedings are not criminal actions, but are instead a ‘civil regulatory scheme.’” *State v. Brooks*, — N.C. App. —, —, 693 S.E.2d 204, 206 (2010) (quoting *State v. Bare*, — N.C. App. —, —, 677 S.E.2d 518, 527 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010)). Accordingly, Green’s oral notice of appeal is insufficient to confer jurisdiction on this Court. *See Brooks*, — N.C. App. at —, 693 S.E.2d at 206 (holding that oral notice of appeal from an SBM hearing or proceeding is insufficient to confer jurisdiction on this Court, and instructing that a defendant must, instead, give written notice of appeal pursuant to N.C. R. App. P. 3(a)).

However, on 4 November 2010, Green filed with this Court a petition for writ of *certiorari*. According to Green, “the law on this issue was in its early stages of interpretation” at the time Green entered oral notice of appeal. Although SBM proceedings were considered

1. “SOAR” is an acronym standing for Sex Offender Accountability and Responsibility.

2. The purpose of such an assessment is to estimate the probability of sexual and violent recidivism.

STATE v. GREEN

[211 N.C. App. 599 (2011)]

part of a “civil regulatory scheme” at the time of Green’s appeal, *Bare*, — N.C. App. at —, 677 S.E.2d at 527, such that written notice of appeal was required at the time, in the interest of justice we elect to grant Green’s petition for writ of *certiorari* and address the merits of his appeal pursuant to N.C. R. App. P. 21.

Discussion

On appeal from an SBM order, “we review the trial court’s findings of fact to determine whether they are supported by competent record evidence, and we review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.” *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation and internal quotation marks omitted). “The trial court’s ‘findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.’” *Id.* at 366, 679 S.E.2d at 432 (2009) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001)).

Green argues on appeal that the order enrolling Green in the SBM program for a period of five years should be vacated because its conclusion that Green required the highest possible level of supervision was erroneous. This Court has previously held that a DOC risk assessment of “moderate,” *without more*, is insufficient to support the finding that a defendant requires the highest possible level of supervision and monitoring. *Kilby*, 198 N.C. App. at 369-70, 679 S.E.2d at 434. However, in the face of a DOC risk assessment of “moderate,” a trial court’s determination that the defendant requires the highest possible level of supervision may be adequately supported where the trial court makes “additional findings” regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings. *See State v. Morrow*, — N.C. App. —, —, 683 S.E.2d 754, 760-62 (2009), *aff’d per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010). In this case, the trial court found that Green requires the highest possible level of supervision and monitoring based on the DOC risk assessment of “moderate-low” and based on the following additional findings: (1) the victims were especially young, neither victim was able to advocate for herself, “one victim was too young to possibly even speak,” and therefore “the risk to other similarly situated individuals is [] substantial;” (2) Green has “committed multiple [acts] of domestic violence;” and (3) Green has obtained no sex offender treatment. On appeal, Green contends that these additional findings were erroneous and/or unsupported by competent evidence and, therefore, the court’s determina-

STATE v. GREEN

[211 N.C. App. 599 (2011)]

tion that Green requires the highest possible level of supervision is not supported by adequate additional findings.

Regarding additional finding one, Green argues that this finding is erroneous because it is based on the underlying factual scenario of his conviction. Green contends that the “facts inherent in the crime to which [he] submitted an *Alford* plea” could not have properly been considered by the trial court and that such facts “were insufficient, and otherwise not additional considerations by the court . . . that otherwise supplemented or should out[]weigh the [DOC risk assessment] of moderate-low risk.” We are unpersuaded by this argument.

Initially, we note that Green presents no legal authority to support his argument that the “facts inherent in the crime” may not be considered as additional factors in the trial court’s determination as to whether a defendant requires the highest possible level of supervision. Furthermore, although this Court has held that the factual context of the crime may not be considered in determining whether a defendant’s offense of conviction was an “aggravated offense” or an offense involving the physical, mental, or sexual abuse of a minor, *State v. Davison*, — N.C. App. —, —, 689 S.E.2d 510, 517 (2009), *disc. review denied*, — N.C. —, 703 S.E.2d 738 (2010), the reasoning supporting that holding is inapplicable in this context. In *Davison*, this Court held that use of the word “conviction” in section 14-208.40A compels the conclusion that only the conviction itself, and not the underlying factual context of the conviction, may be considered in determining whether the defendant was convicted of an aggravated offense or an offense involving the physical, mental, or sexual abuse of a minor. *Id.* However, section 14-208.40A(e), which governs the present inquiry, contains no similar limitation on what may properly be considered by the trial court in determining whether the defendant requires the highest possible level of supervision:

Upon receipt of a risk assessment from [DOC] . . . , the court shall determine whether, based on [DOC’s] risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in [an SBM] program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40A(e) (2009). Indeed, section 14-208.40A(e) mandates that the trial court must look beyond the offense of conviction and consider the DOC risk assessment in making its determi-

STATE v. GREEN

[211 N.C. App. 599 (2011)]

nation. *Id.* Further, this Court has since held that when the trial court is making its determination of whether the defendant requires the highest possible level of supervision, the court “is not limited to the DOC’s risk assessment” and should consider “any proffered and otherwise admissible evidence relevant to the risk posed by a defendant[.]” *Morrow*, — N.C. App. at —, 683 S.E.2d at 760-61. Based on the foregoing, we find nothing to support Green’s contention and, thus, we conclude that the trial court may properly consider evidence of the factual context of a defendant’s conviction when making additional findings as to the level of supervision required of a defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor. Accordingly, we hold that it was not error for the trial court to consider the factual context of Green’s conviction in making its additional findings. Nevertheless, before we can make any determination as to whether the trial court properly concluded that Green requires the highest possible level of supervision, we must first determine whether additional finding one was supported by competent evidence. *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432.

Prior to the initiation of the SBM hearing, the trial court engaged in a plea colloquy with Green, in which Green stipulated to the prosecutor’s summary of the facts. In that summary, the prosecutor stated that at the time of the offense, one victim was 17 months old and the other was four years old. As Green stipulated to the facts as summarized by the prosecutor and failed even to attempt to dispute in any way the age of the victims, we conclude that this evidence sufficiently supported additional finding one. *Cf. State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) (“No proof of stipulated or admitted facts, or of matters necessarily implied thereby, is necessary, the stipulations being substituted for proof and dispensing with evidence. While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent. These principles apply in both civil and criminal cases.” (internal quotation marks, citations, and ellipses omitted)), *superseded on other grounds by statute*, N.C. Gen. Stat. § 20-179(a) (2009) (as recognized in *State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986)); *Morrow*, — N.C. App. at —, 683 S.E.2d at 761-62 (approving of a trial court’s consideration of findings made in a probation revocation proceeding preceding the SBM hearing).

STATE v. GREEN

[211 N.C. App. 599 (2011)]

Regarding additional finding two, which states that Green has committed multiple acts of domestic violence, Green argues that this finding is erroneous as there is no competent evidence supporting it. We agree. The only indications of Green's alleged commission of acts of domestic violence were (1) the State's representation to the trial court that Green pled guilty to "an assault charge involving the mother of the victim in this case," which charge was reduced to a misdemeanor because the mother "wanted that case dismissed;" and (2) the list of prior convictions on his "Prior Record Level" worksheet, which contains the following entry: "AWDWIKI G/L AWDW AND CT[.]" Because the shorthand for Green's prior conviction does not convey that the charge involved domestic abuse, and because the State's statement about the domestic violence aspect of the charge was neither stipulated to nor assented to by Green, we conclude that this "evidence" is insufficient to support the trial court's finding that Green "committed multiple [acts] of domestic violence." *Cf. State v. Mullican*, 329 N.C. 683, 685, 406 S.E.2d 854, 855 (1991) ("We have held that a statement by the prosecuting attorney is not sufficient standing alone to find an aggravating factor. If opposing counsel stipulates to a statement it may be used to support the finding of an aggravating factor." (internal citations omitted)).

Regarding additional finding three—that Green "has obtained no sex offender treatment"—Green argues that this finding is unsupported by the evidence. We disagree. At the SBM proceeding, Green admitted that he had not completed the recommended treatment. Accordingly, we conclude that additional finding three is supported by competent evidence.

As we have concluded that additional findings of fact one and three are supported by competent evidence, we must next determine whether these findings, along with the "moderate-low" risk assessment, support the trial court's determination that Green "requires the highest possible level of supervision and monitoring." We review this determination by the trial court to ensure that it "reflect[s] a correct application of law to the facts found." *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432 (internal quotation marks omitted) (brackets in original).

In our view, the trial court's determination that Green requires the highest possible level of supervision based on the facts that the victims were very young and that Green did not receive any sex offender treatment is a correct application of the law to the facts found. As section 15A-1340.16(d) provides that the very young age of

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

the victim is an appropriate aggravating factor for sentencing purposes, we see no reason why that fact would not also be a similarly “aggravating” finding in the SBM context. *See* N.C. Gen. Stat. § 15A-1340.16(d)(11) (2009). Further, this Court has previously held that evidence that a defendant failed to attend several sessions of a sexual abuse treatment program required as a condition of his probation could support a finding that the defendant requires the highest possible level of supervision. *Morrow*, — N.C. App. at —, 683 S.E.2d at 761 (citing *McKune v. Lile*, 536 U.S. 24, 33, 153 L. Ed. 2d 47, 57 (2002), for the proposition that “an untreated sex offender is significantly more likely to reoffend than if treated”). While we acknowledge that, in this case, the sex offender treatment program was only recommended, not required, for Green, we note that the fact of recommendation rather than requirement does not discount the fact that “an untreated sex offender is significantly more likely to reoffend than if treated.” *See id.* Accordingly, we conclude that the trial court’s additional findings that Green had not received treatment and that the victims were very young were proper findings to support the trial court’s determination that Green requires the highest possible level of supervision.

Based on the foregoing, we conclude that the trial court did not err by enrolling Green in the SBM program for a period of five years.³ The order of the trial court is

AFFIRMED.

Judges HUNTER, ROBERT C., and ERVIN concur.

FRANK STEWART, PLAINTIFF v. CARLOS TIMOTHY “TIM” HODGE, DEFENDANT

No. COA10-926

(Filed 3 May 2011)

1. Jurisdiction— subject matter—objection to claim for exempt property—superior court

Plaintiff’s argument that the trial court lacked jurisdiction over his objection to defendant’s claim for exempt property in an

3. As for Green’s remaining argument that enrollment in SBM violates his many constitutional protections, such argument is unavailing in light of our Supreme Court’s decision in *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010).

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

action arising from an unpaid debt was overruled. The relevant statutory language in N.C.G.S. § 1C-1603(e)(7) neither deprives the superior court of jurisdiction nor renders a superior court order ruling on such an objection void for lack of jurisdiction.

2. Creditors and Debtors— objection to claim for exempt property—timely

The trial court erred in an action arising from an unpaid debt by determining that plaintiff did not object to defendant's claim for exempt property in a timely manner. Given the issuance of a written notice of hearing within the specified time period, plaintiff adequately complied with N.C.G.S. § 1C-1603(e)(5).

3. Creditors and Debtors— objection to claim for exempt property—merits not addressed—remanded to trial court

The Court of Appeals declined to rule on the merits of plaintiff's argument that the trial court erred by allowing defendant to claim exempt property in excess of that allowed by N.C.G.S. § 1C-1601. The matter was remanded to the trial court for consideration.

Appeal by plaintiff from order entered 22 March 2010 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 13 January 2011.

Safran Law Offices, by Lindsey E. Powell and M. Riana Smith, for Plaintiff-Appellant.

ERVIN, Judge.

Plaintiff Frank Stewart appeals from an order denying his objections to the schedule of exempt property claimed by Defendant Timothy Hodge on the grounds that Plaintiff's objections were not filed in a timely manner. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded for further proceedings not inconsistent with this opinion.

I. Factual Background

On 7 February 2008, Plaintiff loaned approximately \$400,000.00 to Defendant pursuant to a written promissory note that required repayment of \$412,500.00 by 11 June 2008. After Defendant failed to repay the loan, Plaintiff filed a complaint against Defendant on 4

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

November 2008 in which he sought to recover compensatory and punitive damages for fraud, constructive fraud, unfair and deceptive trade practices, and negligent misrepresentation. On 20 November 2008, Defendant sought an extension of the time within which he was entitled to file an answer to Plaintiff's complaint until 8 January 2009.

On 8 January 2009, the parties executed a Settlement Agreement under which Defendant agreed to pay Plaintiff \$313,100.00 in two installments, with the first payment of \$50,000.00 due by 5 February 2009, and Plaintiff agreed to grant Defendant an extension of time until 9 February 2009 within which to respond to his complaint. However, Defendant failed to make the first of the two required payments and did not file a responsive pleading in a timely manner.

On 12 February 2009, Plaintiff moved for entry of default. On the same date, the Clerk of Superior Court of Gaston County made an entry of default against Defendant. On 23 March 2009, Plaintiff filed a Motion for Default Judgment and a Notice of Hearing. On 9 April 2009, Defendant moved to set aside the entry of default and filed an answer to Plaintiff's complaint. On 29 July 2009, Judge Beverly T. Beal entered an order denying Defendant's motion to set aside the entry of default. On 3 November 2009, Judge Timothy L. Patti entered an order denying Defendant's renewed motion to set aside the entry of default, granting Plaintiff's motion for entry of default judgment, and awarding judgment in favor of Plaintiff in the amount \$1,012,500.00, plus attorney's fees in the amount of \$27,000.00.

On 7 December 2009, Plaintiff signed and dated a Notice of Right to Have Exemptions Designated and a Motion to Claim Exempt Property. The portion of the copy of Plaintiff's Notice and Motion appearing in the record on appeal specifying the manner in which this filing was served on Defendant has not been completed. On 8 January 2010, Defendant dated and signed a completed Motion to Claim Exempt Property. Although Defendant's counsel signed the certificate of service appended to Defendant's motion, the manner in which Defendant served Plaintiff with a copy of his claim of exemptions is not specified. On 20 January 2010, the Clerk, using a form provided by the Administrative Office of the Courts, filed a Notice of Hearing on Exempt Property which stated that:

The judgment creditor (plaintiff) in the above case has objected to the exemptions claimed by the judgment debtor (defendant). A

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

hearing to designate exemptions will be held by the superior¹ court judge at the date, time and location set out below.

The notice scheduled a hearing on Plaintiff's objections to Defendant's claim for exemptions on 15 February 2010. The hearing was rescheduled for 22 March 2010. On 8 February 2010, Plaintiff filed a separate motion objecting to that portion of Defendant's claim for exemptions that sought to have \$5,000.00 in household goods declared exempt from Plaintiff's claims.

On 22 March 2010, the trial court conducted a hearing and entered an order ruling that:

. . . [I]t appearing to the Court that the defendant . . . filed his Motion to Claim Exempt Property on January 8, 2010; that the plaintiff filed the above-referenced Objection on February 8, 2010; that [N.C. Gen. Stat. §] 1603(e)(5) provides that any objection to the Motion to Claim Exempt Property shall be filed within 10 days of the service of said Motion[; and] that plaintiff [n]oticed the hearing on his Objection for Monday, March 22, 2010[.] . . . IT IS THEREFORE ORDERED that plaintiff's Objection is hereby DENIED as having been untimely filed.

Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Jurisdiction

[1] First, Plaintiff argues that the trial court lacked jurisdiction over his objection to Defendant's claim for exemptions. In support of this argument, Plaintiff relies on N.C. Gen. Stat. § 1C-1603(e)(7) (2009), which states that:

If the judgment creditor objects to the schedule filed or claimed by the judgment debtor, the clerk must place the motion for hearing by the district court judge, without a jury, at the next civil session.

A careful analysis of the language of N.C. Gen. Stat. § 1C-1603(e)(7) indicates that nothing in the relevant statutory language deprives the Superior Court of jurisdiction to hear a party's objections to a claim for exemptions.

1. The original notice specified, consistent with the language contained in the pre-printed Administrative Office of the Courts form, that the objection to Defendant's claim of exemptions would be heard before a District Court judge rather than a Superior Court judge. However, the reference to a hearing before a District Court judge was stricken and replaced with a reference to a hearing before a Superior Court judge.

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

N.C. Gen. Stat. § 7A-240 provides that:

Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

"It is, therefore, evident that[,] except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over 'all justiciable matters of a civil nature.' " *Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673, 675 (1987). "This statute[, N.C. Gen. Stat. § 7A-240,] leads to the conclusion that, when the legislature created the district court division and gave it concurrent original jurisdiction over all matters except probate and matters of decedents' estates, it did not thereby divest the superior court division of any of its original jurisdiction." *East Carolina Farm Credit v. Salter*, 113 N.C. App. 394, 399, 439 S.E.2d 610, 612 (1994).

In addition, N.C. Gen. Stat. § 7A-242 specifically provides that:

For the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this Article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding.

Plaintiff cites no authority holding that the provisions of N.C. Gen. Stat. § 1C-1603(e)(7) are jurisdictional, and we have not identified any such statutory language or judicial decisions in the course of our own research. As a result, we conclude that, while N.C. Gen. Stat. § 1C-1603(e)(7) directs the Clerk of Superior Court to place an objection to a claim that certain property be declared exempt on for hearing at the next civil session of the District Court, the relevant statutory

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

language neither deprives the Superior Court of jurisdiction nor renders a Superior Court order ruling on such an objection void for lack of jurisdiction.

B. Timeliness of Plaintiff's Objection

[2] Next, Plaintiff argues that the trial court erred by determining that he did not object to Defendant's claim for exemptions in a timely manner. We believe that Plaintiff's contention has merit.

As a preliminary matter, we note that neither party appears to have strictly complied with the requirements of the relevant statutory provisions. N.C. Gen. Stat. § 1C-1603(a)(1) states that a "judgment debtor may have his exempt property designated by motion after judgment has been entered against him." According to N.C. Gen. Stat. § 1C-1603(a)(4):

After judgment, except as provided in [N.C. Gen. Stat. §] 1C-1603(a)(3) or when exemptions have already been designated, the clerk may not issue an execution or writ of possession unless notice from the court has been served upon the judgment debtor advising the debtor of the debtor's rights. The judgment creditor shall cause the notice . . . to be served on the debtor as provided in [N.C. Gen. Stat. §] 1A-1, Rule 4(j)(1). . . . Proof of service by certified or registered mail or personal service is as provided in G.S. 1A-1, Rule 4.

Although N.C. Gen. Stat. § 1C-1603(a)(4) clearly required Plaintiff to serve a notice of rights upon Plaintiff in the manner required by N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) and to make proof of service in accordance with N.C. Gen. Stat. § 1A-1, Rule 4, the record does not show the manner in which service of the notice of rights was effectuated upon Defendant. In addition, we note that N.C. Gen. Stat. § 1C-1603(d) provides that, "[i]f the judgment debtor moves to designate his exemptions, a copy of the motion and schedule must be served on the judgment creditor as provided in [N.C. Gen. Stat. §] 1A-1, Rule 5." Rule 5, in turn, states that:

(b) With respect to all . . . papers required or permitted to be served, . . . service upon the attorney or upon a party may . . . be made by delivering a copy to the party or by mailing it to the party at the party's last known address[.] . . . A certificate of service shall accompany every pleading and every paper required to be served on any party . . . [and] shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

has been served. . . . Each certificate of service shall be signed in accordance with and subject to [N.C. Gen. Stat. § 1A-1,] Rule 11[.]

Although Defendant signed and dated a claim for exemptions on 8 January 2010, he failed to indicate the method which he utilized to serve his claim of exemptions upon Plaintiff. N.C. Gen. Stat. § 1C-1603(e)(5) provides that “[t]he judgment creditor has 10 days from the date served with a motion and schedule of assets or from the date of a hearing to claim exemptions to file an objection to the judgment debtor’s schedule of exemptions.” Since Defendant did not file a brief and has not, for that reason, challenged Plaintiff’s claim to have been served with Defendant’s claim for exemptions by mail, we accept Plaintiff’s contention for purposes of our review. As a result, assuming that Defendant mailed Plaintiff a copy of his claim of exemptions on 8 January 2010, Plaintiff had ten days from 11 January 2010 to file an objection to the claimed exemptions, thus making his objection due on 21 January 2010.

On 20 January 2010, the Clerk issued a Notice of Hearing on Exempt Property stating that:

[t]he judgment creditor (plaintiff) in the above case has objected to the exemptions claimed by the judgment debtor (defendant). A hearing to designate exemptions will be held by the superior court judge at the date, time and location set out below.

As the record reflects, the notice of a hearing on Plaintiff’s objections was filed prior to the expiration of the applicable deadline and clearly states that Plaintiff objected to Defendant’s claim for exemptions. As a result, it is clear that Plaintiff voiced objections to Defendant’s claim for exemptions by 20 January 2010.

We also note that N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) provides that:

An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Admittedly, the literal language of N.C. Gen. Stat. § 1C-1603(e)(5) requires a judgment creditor to file an objection to claimed exemptions, rather than requiring the filing of a motion. However, we find the language of N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) useful in analyzing the requirements of N.C. Gen. Stat. § 1C-1603(e)(5). We can see no

STEWART v. HODGE

[211 N.C. App. 605 (2011)]

reason why, since the requirement of a written motion is satisfied by the statement of that motion in a written notice of a hearing, that the requirement of filing an objection to a claim of exemptions could not be satisfied in the same manner, particularly given that nothing in N.C. Gen. Stat. § 1C-1603(e)(5) requires that a valid objection take any particular form and since Defendant clearly had notice of the exact substantive issue that Plaintiff wished to litigate prior to the date upon which that objection was scheduled for hearing.

As a result, we conclude that, given the issuance of a written notice of hearing within the specified time period, Plaintiff adequately complied with N.C. Gen. Stat. § 1C-1603(e)(5). Thus, the trial court erred by concluding otherwise and denying Plaintiff's objection on the basis of an alleged lack of timeliness.²

C. Substantive Validity of Claimed Exemptions

[3] Finally, Plaintiff argues that the trial court erred by "allowing [Defendant] to claim exempt property in excess of that allowed by N.C. Gen. Stat. § 1C-1601." However, the substantive merits of Plaintiff's objections to the claimed exemptions were neither argued at the hearing nor addressed by the trial court, which merely decided that Plaintiff had failed to file a timely objection. Because the trial court did not address the substantive issue raised by Plaintiff's objection and because the parties did not have an adequate chance to develop a record relating to these objections, we decline to rule on the merits of Plaintiff's objections and leave that issue for decision by the trial courts, at least in the first instance.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by denying Plaintiff's objection to Defendant's claim of exemptions on the grounds that Plaintiff failed to object to Defendant's claim in a timely manner. As a result, the trial court's order is hereby reversed and this case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and STEELMAN concur.

2. In fairness to the trial court, it should be noted that, at the hearing on Plaintiff's objections to Defendant's claim of exemptions, Defendant's counsel did not inform the trial court that a notice of hearing indicating Plaintiff's objections to Defendant's claim of exemption had been filed within the statutorily-prescribed time limits.

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

STATE OF NORTH CAROLINA v. CHARLES BRANDON HOWELL

No. COA10-476

(Filed 3 May 2011)

1. Constitutional Law— motion for speedy trial—motion filed by defendant personally—represented by counsel

A trial court could consider a speedy trial motion filed by a defendant personally even though the defendant was represented by counsel.

2. Constitutional Law— speedy trial violations—constitutional or statutory basis uncertain

A trial court order dismissing charges against a defendant for speedy trial violations was remanded where the grounds for the dismissal could not be determined from the record. While it seemed evident that the trial court based its ruling at least in part on a violation of defendant's constitutional right to a speedy trial, it was not evident whether the court also based its decision in part on potential statutory violations. It was noted that N.C.G.S. § 15A-711 does not guarantee a right to trial within a specific time and that a violation of the statute is not a violation of the Sixth Amendment right to a speedy trial.

3. Constitutional Law— speedy trial—time of denial impossible to determine—analysis of all Barker factors required

The trial court relied upon an incorrect standard in ruling on defendant's motion to dismiss for violation of his constitutional speedy trial rights where the trial court believed that dismissal was the only possible remedy when it was impossible to determine precisely when the right had been denied. In order to conclude that there has been a Sixth Amendment violation of a defendant's right to a speedy trial, the court must examine and consider all of the factors in *Barker v. Wingo*, 407 U.S. 514. Reliance on headnotes rather than holdings was cautioned against.

Appeal by the State from order entered 9 November 2009 by Judge Patrice A. Hinnant in Superior Court, Forsyth County. Heard in the Court of Appeals 1 December 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for Defendant.

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

McGEE, Judge.

Charles Brandon Howell (Defendant) was indicted on 13 April 2009 on one count each of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. Defendant was also indicted on that same date for having attained habitual felon status. By at least 26 April 2009, Defendant was in state prison on other charges, as on that date Defendant sent a letter from prison requesting a speedy trial in the present case. Upon the State's request, Defendant was transported from prison to the Forsyth County Jail on 13 May 2009 so that he could be tried on the present charges. Transfers of this kind are made pursuant to N.C. Gen. Stat. § 15A-711 (2009), which states in relevant part:

(a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days.

N.C.G.S. § 15A-711(a). Defendant wrote additional letters to the Forsyth County Clerk of Superior Court inquiring about the status of his case, including one dated 24 May 2009, that stated: "I filed a speedy trial motion back in April. Could you let me know what day yall received it on?" Defendant also wrote to the Forsyth County Clerk of Superior Court on 3 August 2009. In his letter, Defendant enclosed a "Motion and Request for Dismissal" and requested that it be filed. In his "Motion and Request for Dismissal," Defendant asked that his charges be dismissed because he had been held at the Forsyth County Jail for over sixty days, which constituted a violation of N.C.G.S. § 15A-711(a). The trial court heard Defendant's "Motion and Request for Dismissal" on 9 November 2009. Though Defendant's "Motion and Request for Dismissal" was written in terms that could be viewed as limiting the review to possible violations of N.C.G.S. § 15A-711, because Defendant had written the filing himself and because of his earlier correspondences, the State, the trial court, and Defendant's attorney all proceeded as if the request for dismissal also encompassed alleged violations of Defendant's right to a speedy trial. The State conceded: "[C]ertainly it would be appropriate to inquire into the analysis under the North Carolina and U.S. constitutions, despite any lack of citing, because it's clear what [Defendant's] intent is, is to request a speedy trial." Both Defendant and the State made

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

arguments concerning N.C.G.S. § 15A-711 and issues involving Defendant's constitutional right to a speedy trial. Though not entirely clear from either the transcript or the subsequent order dismissing the charges, it appears that both Defendant and the State ultimately based their arguments concerning whether the charges against Defendant should be dismissed on Sixth Amendment grounds. In delivering its ruling in open court, the trial court, though mentioning three statutes, appears to have based its ruling on its analysis with respect to the Sixth Amendment arguments and law presented by Defendant and the State. The trial court determined that the charges against Defendant should be dismissed and it did dismiss the charges by judgment entered 9 November 2009. The State appeals.

I.

[1] The State first argues that the trial court should not have considered Defendant's "Motion and Request for Dismissal" because Defendant filed it himself when he was represented by counsel. However, Defendant's counsel, the State, and the trial court all agreed to address the "Motion and Request for Dismissal" at the hearing, despite its having been filed by Defendant personally. The facts in the present case are clearly distinguishable from those cited by the State in *State v. Williams*, 363 N.C. 689, 686 S.E.2d 493 (2009) (trial court did not err when it refused to rule on the defendant's *pro se* motion because the defendant was represented by counsel at the time, and defendant's counsel in no manner adopted the defendant's motion as his own); and *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) (trial court did not err in denying the defendant's "motion" for a speedy trial where the defendant had "mentioned that he had been denied his right to a speedy trial. However, defense counsel never demanded a speedy trial, nor did counsel file a motion to dismiss for failure to provide a speedy trial."). Nowhere in *Williams* or *Grooms* does our Supreme Court state that a trial court cannot consider a motion filed by a defendant personally when the defendant is represented by counsel, only that it is not error for the trial court to refuse to do so. Further, unlike in *Williams* and *Grooms*, Defendant's counsel in the present case argued the speedy trial issue at the hearing, and both the State and the trial court consented to addressing this issue. This argument is without merit.

II.

[2] The State also argues that, based upon the facts and law presented to the trial court at the hearing, the trial court erred in dismissing the charges against Defendant. First, because we cannot determine from

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

the record the grounds upon which the trial court made its ruling dismissing the charges against Defendant, we must remand.

The order dismissing the charges against Defendant was filed on 9 November 2009 and states in full: "This matter came on to be heard by the [trial court] where the court heard a motion to dismiss regarding a speedy trial. The court allows the motion and dismisses the case." At the conclusion of the hearing on Defendant's motion to dismiss, the trial court made the following statements before rendering its ruling:

THE COURT: Madam Clerk, show we are on the motion to dismiss and the request for a speedy trial, whether his rights have been denied as the basis for the motion to dismiss.

And as I understand, you're relying on, after the court made inquiry, 7A-49.4 and then 15A-954 and 15A-711.

The operative date, as the court views it, would be the date of indictment, which is April 13th. The date of the filing of the defendant's motion was May 6th.

And in pertinent part, the cases submitted by counsel would rely—the court will rely on [*State v. Pippin*, 72 N.C. App. 387, 324 S.E.2d 900 (1985)] for the determination of time of trial. And what length of time is appropriate between formal accusation against an accused and time accused is brought to trial is initially within the sound discretion of the trial court.

And, further, that in [*State v. Spivey*, 357 N.C. 114, 579 S.E.2d 251 (2003),] in the first headnote that dismissal of the charge is the only possible remedy for denial of the right to a speedy trial, where it is impossible to determine precisely when the right has been denied.

The court views that the question of whether the defendant has been denied a speedy trial must be answered in light of the facts in the particular case and whether there is a showing of neglect or willfulness on the part of the state, but following most closely would be those trigger dates in April and May.

The motion is allowed.

These statements by the trial court in open court are the only indication we have concerning the reasons supporting the trial court's decision to dismiss the case. While it seems evident that the trial court based its ruling to dismiss, at least in part, on a determi-

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

nation that Defendant's constitutional right to a speedy trial had been violated, it is not evident to our Court whether the trial court also based its decision to dismiss in part on potential violations of any of the statutes referenced in the above quote. We therefore remand to the trial court for additional findings and conclusions that make clear what statutory violations, if any, it has found. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). If the trial court does find statutory violations occurred, it should further indicate what remedy it is granting Defendant for the violations.

We note that N.C.G.S. § 15A-711 does not guarantee a defendant the right to have his matter tried within a specific period of time. N.C.G.S. § 15A-711 is not a "speedy trial" statute. "North Carolina's Speedy Trial Act, N.C. Gen. Stat. § 15A-701, *et seq.*, was repealed 1 October 1989, thus, we now apply federal constitutional standards to speedy trial issues." *State v. Joyce*, 104 N.C. App. 558, 568, 410 S.E.2d 516, 522 (1991) (citations omitted). A violation of N.C.G.S. § 15A-711 does not constitute a violation of a defendant's Sixth Amendment right to a speedy trial. *Id.* "We follow the same [Sixth Amendment] analysis when reviewing [speedy trial] claims under Article I, Section 18 of the North Carolina Constitution." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721 (citations omitted).

[3] Second, the State argues that dismissal of the charges against Defendant, based upon a Sixth Amendment violation of Defendant's right to a speedy trial, constituted error. Because we hold that the trial court reached its Sixth Amendment ruling under a misapprehension of the law and without conducting a complete analysis, including consideration of all the relevant facts and law in this case, we vacate the 9 November 2009 order and remand to the trial court for further action.

We have no way of determining which headnote the trial court referenced in making its determination in reliance on *Spivey*. We caution that headnotes are not reliable expressions of the law and they do not have precedential value. The actual holdings of the relevant appellate opinions must be consulted.

Our Supreme Court in *Spivey* stated:

"The right to a speedy trial is different from other constitutional rights in that, among other things, *deprivation of a speedy trial does not per se prejudice the ability of the accused to defend himself*; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.” *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

In Barker v. Wingo, the United States Supreme Court identified four factors that “courts should assess in determining whether a particular defendant has been deprived of his right” to a speedy trial under the federal Constitution. 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). These factors are: (i) the length of delay, (ii) the *reason for delay*, (iii) the *defendant’s assertion of his right to a speedy trial*, and (iv) *whether the defendant suffered prejudice as a result of the delay*. *Id.*; see also *State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). “We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution.” *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

Spivey, 357 N.C. at 118, 579 S.E.2d at 254 (some emphasis added). The language quoted above: “deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself[,]” may lead to some understandable confusion, especially as it is followed by the language “dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.” When read in context, we understand these statements to mean that an unwarranted *delay* does not *per se* establish a violation of a defendant’s Sixth Amendment right to a speedy trial. In order to conclude there has been a Sixth Amendment violation of a defendant’s right to a speedy trial, the trial court must examine and consider *all* the *Barker* factors listed above. *Id.* at 118, 579 S.E.2d at 254.

First, the length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial.

....

Second, defendant has the burden of showing that the delay was caused by the *neglect* or *willfulness* of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence.

STATE v. HOWELL

[211 N.C. App. 613 (2011)]

. . . .

Third, defendant's . . . assertion of his right to a speedy trial is not determinative of whether he was denied the right. . . . *See Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118 (holding that none of the factors alone is sufficient to establish a violation and that all must be considered together).

Fourth, in considering whether a defendant has been prejudiced because of a delay, this Court has noted that a speedy trial serves “ ‘(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.’ ”

A defendant must show actual, substantial prejudice. *State v. Goldman*, 311 N.C. 338, 346, 317 S.E.2d 361, 366 (1984) (holding that “in the absence of a showing of actual prejudice, . . . our courts should consider dismissal in cases of serious crimes with extreme caution”).

Spivey, 357 N.C. at 119-22, 579 S.E.2d at 255-57 (some internal citations omitted). However,

“ ‘none of the four factors . . . [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. . . . In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.’ ” *Barker v. Wingo*, [407 U.S. 514, 33 L. Ed. 2d. (1972)].

State v. Pippin, 72 N.C. App. 387, 391, 324 S.E.2d 900, 903 (1985) (citations omitted).

It is only after a trial court has considered all of the factors together and determined that a defendant has suffered an actual Sixth Amendment violation of his right to a speedy trial that dismissal of charges becomes mandatory.

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Barker v. Wingo, 407 U.S. 514, 522, 33 L. Ed. 2d 101, 112 (1972).

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

It appears the trial court erroneously believed “dismissal of the charge[s] [was] the only possible remedy for denial of the right to a speedy trial, *where it [wa]s impossible to determine precisely when the right ha[d] been denied.*” (Emphasis added). “‘[I]t is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial[.]’” *Spivey*, 357 N.C. at 118, 579 S.E.2d at 254, quoting *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

[T]he length of the delay is not *per se* determinative of whether the defendant has been deprived of his right to a speedy trial. The United States Supreme Court has found post accusation delay “presumptively prejudicial” as it approaches one year. However, presumptive prejudice “does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.”

Grooms, 353 N.C. at 62, 540 S.E.2d 713, 721 (internal citations omitted). We hold the trial court relied upon an incorrect standard in ruling on Defendant’s motion to dismiss with respect to Defendant’s constitutional rights, and did not conduct a full inquiry into all of the *Barker* factors before making its determination.

We therefore vacate the trial court’s 9 November 2009 order dismissing this case and remand for action consistent with this opinion.

Vacated and remanded.

Chief Judge MARTIN and Judge ERVIN concur.

IN THE MATTER OF: J.S.W.

No. COA10-981

(Filed 3 May 2011)

**1. Jurisdiction— subject matter—juvenile delinquent—
Department of Juvenile Justice and Delinquency Prevention**

The district court had subject matter jurisdiction in a juvenile delinquency case to order that defendant have no home or overnight visits and that defendant be allowed to work off cam-

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

pus only on the condition that he not be around anyone twenty-five years of age or younger. The court retained jurisdiction even though the juvenile had been committed to the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center.

2. Juveniles—delinquency—district court order—exercised discretion in accordance with statute

The district court did not abuse its discretion in a juvenile delinquency case by entering an order that defendant have no home or overnight visits and that defendant be allowed to work off campus only on the condition that he not be around anyone twenty-five years of age or younger. Taken as a whole, the district court's statements and decision demonstrated that it exercised its discretion in accordance with the criteria set forth in N.C.G.S. § 7B-2501(c).

Appeal by juvenile from order entered 31 March 2010 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 24 January 2011.

Roy Cooper, Attorney General, by LaToya B. Powell, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Kristen L. Todd, Assistant Appellate Defender, for juvenile-appellant.

MARTIN, Chief Judge.

On 12 June 2007, pursuant to a plea, the juvenile, J.S.W., admitted the allegations contained in petitions alleging that he had committed the offenses of first-degree rape, first-degree sexual offense, breaking or entering, larceny after breaking or entering, selling or delivering a controlled substance, and possession of stolen goods, and the State voluntarily dismissed allegations of simple assault and indecent liberties between children. The juvenile was adjudicated delinquent for the offense of first-degree rape under N.C.G.S. § 14-27.2. The district court entered a Level 3 Disposition and Commitment Order in which it ordered that the juvenile be committed to the Department of Juvenile Justice and Delinquency Prevention (the Department) for placement in a youth development center for a minimum period of six months and for a total period of commitment that is indefinite. The district court also ordered that the juvenile

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

[Have n]o contact with [specified individuals]
Register as a Sex Offender
Undergo a Sex Offender Specific Evaluation and Treatment
Undergo a Psychological Evaluation
Cooperate with Substance Abuse Treatment
Remain in YDC for the maximum time allowed by law.

On 3 April 2009, a Motion for Review was filed requesting “to extend [the juvenile’s] commitment at the Youth Development Center.” On 7 August 2009, the district court entered an order which included findings that the district court’s original order that the juvenile remain in the Department’s custody until his twenty-first birthday should remain in effect and that the juvenile had “not successfully completed sex offender specific treatment as ordered.” The district court ordered that the juvenile remain in the Department’s custody until his twenty-first birthday, that he be provided all educational benefits available, and that the district court would “entertain a request for an earlier release upon successful completion of sex offender specific treatment.” On 14 December 2009, a second Motion for Review was filed. On 9 February 2010, the district court entered an order finding and concluding that the juvenile had “successfully completed the Sex Offender Specific Treatment” and ordering that the juvenile “shall remain in the Youth Development Center until his twenty-first birthday.”

On 5 March 2010, a juvenile court counselor filed a Motion for Review stating “[t]hat the Youth Development Center staff and [the juvenile’s] parent would like some clarification as to whether the juvenile can work off campus and participate in home visits or overnight visits.” On 25 March 2010, a letter signed by a Work Force Investment Act Career Specialist at the C.A. Dillon Youth Development Center (the YDC) was filed. The letter stated that J.S.W. “would be a great candidate for the [Work Force Investment Act] program,” stated that if J.S.W. were placed in the program, he “would be able to go off C.A. Dillon’s campus and participate in on-the-job training programs,” and requested “the permission of the court to include [J.S.W.] in[] th[e] program.” The district court conducted a hearing on the motion. During the hearing, the State requested that the juvenile be denied the opportunities to work off campus and to participate in home and overnight visits. The State noted that “[t]he victim [of the rape] . . . was mentally challenged” and that, following the rape, additional petitions were filed alleging the juvenile’s delinquency for having committed felony drug offenses. The district court heard from Mr.

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

Peter Koontz, a senior psychologist at the YDC, and Ms. Monica Glover, a psychologist who treated J.S.W., both of whom requested that J.S.W. be allowed to participate in the YDC's programs; Mr. Eric Duane Lee, a minister familiar with J.S.W.'s case; and J.S.W.'s mother. Following the hearing, the district court ordered

1. That the juvenile may work off campus but is to not be around anybody who is twenty five years or younger.
2. That the juvenile have no home or overnight visits.
3. That the juvenile can participate in outings with YDC but there is to be direct supervision at all times.

The juvenile appeals from that order.

[1] The juvenile first contends that the district court erred by ordering that he have no home or overnight visits and by ordering that he may work off campus on the condition that he not be around anyone twenty-five years of age or younger which, the juvenile contends, effectively prevents him from working off campus entirely. The juvenile contends that upon being committed to the Department, the Department had authority, as provided by N.C.G.S. § 143B-516, over the "services, privileges, or punishments [he] should and should not receive while in the custody of the Department," and that, therefore, the district court lacked subject matter jurisdiction and exceeded its authority by entering an order concerning those services, privileges, and punishments. We disagree.

"The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent." N.C. Gen. Stat. § 7B-1601(a) (2009). When a juvenile is committed to the Department for placement in a youth development center "for an offense that would be . . . first-degree rape pursuant to G.S. 14-27.2 . . . if committed by an adult, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 21 years, whichever occurs first." N.C. Gen. Stat. § 7B-1602(a) (2009). "Commitment of a juvenile to the Department for placement in a youth development center does not terminate the court's continuing jurisdiction over the juvenile and the juvenile's parent, guardian, or custodian." N.C. Gen. Stat. § 7B-2513(g) (2009). "Commitment of a juvenile to the Department for placement in a youth development center transfers only physical custody of the juvenile." *Id.* Upon a motion or petition and "after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.” N.C. Gen. Stat. § 7B-2600(a) (2009). In a case of delinquency, the court “may reduce the nature or the duration of the disposition on the basis that it was imposed in an illegal manner or is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given to juveniles convicted of similar offenses.” N.C. Gen. Stat. § 7B-2600(b).

In any case where the court finds the juvenile to be delinquent or undisciplined, the jurisdiction of the court to modify any order or disposition made in the case shall continue (i) during the minority of the juvenile, . . . (iii) until the juvenile reaches the age of 21 years if the juvenile has been adjudicated delinquent and committed for an offense that would be . . . first-degree rape pursuant to G.S. 14-27.2 . . . if committed by an adult, or (iv) until terminated by order of the court.

N.C. Gen. Stat. § 7B-2600(c). “The North Carolina Juvenile Code patently provides for jurisdiction to lie exclusively in the district court between the stages of allegation and the final release of a juvenile.” *In re Doe*, 329 N.C. 743, 748, 407 S.E.2d 798, 801 (1991).

In *In re Doe*, our Supreme Court addressed a juvenile’s challenge to a district court’s order based on the Separation of Powers Clause of the Constitution of North Carolina. *Id.* at 751, 407 S.E.2d at 803. The district court in *In re Doe* had entered an order denying the conditional release of a juvenile based on the failure of the Department of Human Resources, Division of Youth Services,¹ to comply with the district court’s original order that the juvenile receive specific treatment for sexual offenders while he was committed. *Id.* at 747-48, 407 S.E.2d at 800-01. In rejecting the juvenile’s argument, our Supreme Court reasoned that “[n]ecessary, functional overlap of two of the three separate, coordinate branches of government has been drafted directly into the Juvenile Code by the third, the legislative branch.” *Id.* at 753, 407 S.E.2d at 804. The Court noted that “[t]he Code combines and coordinates the custodial and administrative role of DYS as an executive agency with the continuing jurisdiction and supervisory role of the district court,” *id.*, and cited various portions of the Juvenile Code reflecting that functional overlap, which include statutes now codified as N.C.G.S. §§ 7B-2506 and 7B-2514. *See* N.C.

1. The Department of Human Resources, Division of Youth Services is now part of the Department of Juvenile Justice and Delinquency Prevention.

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

Gen. Stat. § 7B-2506(19) (2009) (authorizing court to suspend imposition of more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions); N.C. Gen. Stat. § 7B-2514(a)(1) (2009) (requiring written notification of post-release planning decision to the committing court). The Court further noted that, in the context of the Juvenile Code, “overnice concerns about the separation of powers as a question of a precise division of labor are bootless.” *In re Doe*, 329 N.C. at 754, 407 S.E.2d at 805.

The juvenile argues that the holding in *In re Doe* is inapplicable and attempts to distinguish the facts in *In re Doe* from the facts here on the ground that in *In re Doe*, the district court’s denial of the juvenile’s conditional release from the detention center and order that he receive specialized sex offender treatment involved “dispositional directives,” whereas here, the district court’s order involved “privileges or punishments” the juvenile should and should not receive while in the custody of the Department. For his argument, the juvenile relies on no authority aside from N.C.G.S. § 143B-516 and the Department’s policies. Although N.C.G.S. § 143B-516 provides the Secretary of the Department the powers and duties of, among other things, “[o]perat[ing] juvenile facilities and implement[ing] programs that meet the needs of juveniles receiving services and that assist them to become productive, responsible citizens” and “[a]dopt[ing] rules to implement this Article and the responsibilities of the Secretary and the Department under Chapter 7B of the General Statutes,” *see* N.C. Gen. Stat. § 143B-516(b)(4)-(5) (2009), given the “[n]ecessary, functional overlap” of the Department and the committing court in juvenile cases, *see In re Doe*, 329 N.C. at 753, 407 S.E.2d at 804, under the circumstances in this case, we are unwilling to accept the juvenile’s argument that the district court was without authority to enter an order affecting “privileges or punishments” established by the Department.

[2] The juvenile next contends the district court abused its discretion in entering its order by considering punishment as a purpose of the Juvenile Code instead of considering the factors set forth in N.C.G.S. § 7B-2501(c). We disagree.

After hearing testimony which included requests that the juvenile be permitted to have home and overnight visits and work off campus, the district court stated that “part of the process of juvenile court is . . . punishment. That young girl is going to need help the rest of her life too.” The district court continued, “[T]here are two goals this Court has. One of them is definitely rehabilitation because I know that at

IN RE J.S.W.

[211 N.C. App. 620 (2011)]

some point he will be on the streets. And it varies for different persons and varies for different crimes and the nature of them. Punishment sometimes is also my goal.” The district court then repeated, “Punishment is one of the goals. And I make no bones about it.”

N.C.G.S. § 7B-2501 requires that the district court consider the “seriousness of the offense,” the “need to hold the juvenile accountable,” the “importance of protecting the public safety,” the “degree of culpability indicated by the circumstances of the particular case,” and the “rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment” in selecting disposition “designed to protect the public and to meet the needs and best interests of the juvenile.” *See* N.C. Gen. Stat. § 7B-2501(c) (2009). The district court’s statements reflect that it considered these dispositional objectives. Indeed, the trial court allowed the juvenile to work off campus as long as the juvenile did not come into contact with anyone aged twenty-five years or younger. By doing so, the district court ultimately balanced the importance of protecting the public safety with the rehabilitative needs of the juvenile. Although “dispositions in juvenile actions have a greater focus on accountability and responsibility” than do criminal sentences, which are “designed to impose a punishment commensurate with the injury the offense has caused . . . and to provide a general deterrent to criminal behavior,” *In re D.L.H.*, 364 N.C. 214, 217, 694 S.E.2d 753, 755 (2010) (omission in original) (internal quotation marks omitted), taken as a whole, the district court’s statements and decision demonstrate that it exercised its discretion in accordance with the criteria set forth in N.C.G.S. § 7B-2501(c). *See In re Z.A.K.*, 189 N.C. App. 354, 362, 657 S.E.2d 894, 898-99 (2008) (“We also find no merit in defendant’s claim that the trial court failed to exercise dispositional discretion. Although defendant notes two instances in which the trial judge indicated a general policy preference on his part for level II dispositions for juveniles who commit felonies, the extended discussion in the transcripts reveals that the judge considered a variety of factors before design[ing] an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State.” (internal quotation marks omitted)).

No error.

Judges HUNTER and THIGPEN concur.

ESTATE OF WILLIAMS v. PASQUOTANK CNTY. PARKS & RECREATION DEP'T

[211 N.C. App. 627 (2011)]

ESTATE OF ERIK DOMINIC WILLIAMS, BY AND THROUGH EASTER WILLIAMS
OVERTON, PERSONAL REPRESENTATIVE, PLAINTIFF v. PASQUOTANK COUNTY PARKS &
RECREATION DEPARTMENT AND PASQUOTANK COUNTY, DEFENDANTS

No. COA10-491

(Filed 3 May 2011)

**Immunity— governmental—proprietary function—operation
of party facilities at public park**

The trial court did not err in a negligence case by denying defendant county's limited motion for summary judgment based on governmental immunity because defendant was involved in a proprietary function in the operation of the party facilities at a public park.

Appeal by defendant Pasquotank County from order entered 4 November 2009 by Judge Alma L. Hinton in Pasquotank County Superior Court. Heard in the Court of Appeals 2 November 2010.

Dixon & Thompson Law PLLC by Sanford W. Thompson, IV and Samuel B. Dixon and Law Offices of Janice McKenzie Cole PLLC by Janice M. Cole, for plaintiff-appellee.

Teague Campbell Dennis & Gorham, L.L.P. by Henry W. Gorham and Daniel N. Kluttz, for defendants-appellants.

STROUD, Judge.

Defendant Pasquotank County appeals the denial of its limited motion for summary judgment based on governmental immunity. As we conclude that defendant Pasquotank County was involved in a proprietary function, we affirm.

I. Background

This action arises out of the death of Mr. Erik Dominic Williams on 10 June 2007 at Fun Junktion, a public park owned by Pasquotank County and operated by Pasquotank County Parks & Recreation Department (collectively "defendants"). The estate of Mr. Williams brought this suit for negligence against defendants after Mr. Williams drowned in the "Swimming Hole" which was part of the area rented out for use by private parties at Fun Junktion. On or about 9 December 2008, defendants answered plaintiff's complaint and

ESTATE OF WILLIAMS v. PASQUOTANK CNTY. PARKS & RECREATION DEP'T

[211 N.C. App. 627 (2011)]

alleged the defenses of governmental and sovereign immunity and contributory negligence. On or about 4 September 2009, defendants filed a motion for limited summary judgment which stated that “[t]he basis of this Motion is that the allegations of the Complaint relate to the performance of governmental functions by Pasquotank County Parks & Recreation Department and Pasquotank County[.]” On 4 November 2009, the trial court denied defendant’s motion for limited summary judgment because

defendants charged and collected a fee from Keith and Cheryl Bowe for their guests, including Erik Williams, for the use of the Fun Junktion park, and defendants were providing the same type of facilities and services that private individuals or corporations could provide, and therefore, defendants were involved in a proprietary activity with respect to the Bowes and their guests such that the defense of governmental immunity does not apply[.]

Defendant Pasquotank County appeals.¹

II. Governmental Immunity

Defendant’s sole issue on appeal is whether the trial court erred in denying its motion for limited summary judgment based upon governmental immunity. *Owens v. Haywood County* notes that a denial of a motion for summary judgment on this basis is immediately appealable and sets forth the proper standard of review:

[g]enerally, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order is interlocutory and does not affect a substantial right. However, when the motion is made on the grounds of sovereign and qualified immunity, such a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity. In the instant case, defendants have asserted the defense of sovereign immunity and, thus, their appeal is properly before this Court.

The standard of review on a trial court’s ruling on a motion for summary judgment is *de novo*. The entry of summary judgment is appropriate where the pleadings, depositions, answers to

1. Throughout the record, various documents refer to defendants, Pasquotank County and Pasquotank County Parks & Recreation, as two separate defendants. While the record does not necessarily demonstrate that these are two separate legal entities, the notice of appeal is *only* as to defendant Pasquotank County. As it makes no difference in our analysis, based upon the notice of appeal, we will refer only to defendant Pasquotank County hereafter.

ESTATE OF WILLIAMS v. PASQUOTANK CNTY. PARKS & RECREATION DEP'T

[211 N.C. App. 627 (2011)]

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion. Summary judgment is proper when an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense.

Owen v. Haywood County, — N.C. App. —, —, 697 S.E.2d 357, 358-59 (citations, quotation marks, ellipses, and heading omitted), *disc. review denied*, — N.C. —, 705 S.E.2d 361 (2010).

A. Liability Insurance

Defendant first contends that “[d]efendants did not waive the defense of governmental immunity by the purchase of liability insurance[.]” Plaintiffs’ brief states that this point “is not disputed now, and was not disputed when the summary judgment motion was heard. Plaintiff-Appellee does not contend that purchase of insurance constituted a waiver of governmental immunity.” As plaintiffs concede that defendants purchase of liability insurance did not waive governmental immunity and as the trial court’s denial of defendants’ limited motion for summary judgment was not based upon defendants’ liability insurance, we need not address this issue.

B. Proprietary Function

Defendants next contend that because Fun Junktion is a public park and because operating public parks is a governmental function pursuant to N.C. Gen. Stat. § 160A-351, “governmental immunity bars plaintiff’s claim.” See N.C. Gen. Stat. § 160A-351 (2007) (“[T]he creation, establishment, and operation of parks and recreation programs is a proper governmental function[.]”). However, “governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.” *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004). “Governmental immunity shields a state entity in the performance of governmental functions, but not proprietary functions.” *Willett v. Chatham Cty. Bd. of Educ.*, 176 N.C. App. 268, 270, 625 S.E.2d 900, 902 (2006). What qualifies as a governmental function and what qualifies as a proprietary function is not always clear; our Supreme Court noted in *Sides v. Hospital*, that “application of the governmental-proprietary distinction to given factual situations has

ESTATE OF WILLIAMS v. PASQUOTANK CNTY. PARKS & RECREATION DEP'T

[211 N.C. App. 627 (2011)]

resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.” 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975) (quotation marks and brackets omitted), *superseded by statute on other grounds as recognized by Odom v. Clark*, 192 N.C. App. 190, 668 S.E.2d 33 (2008). From these “irreconcilable splits of authority[,]” *id.*, we will attempt to distill the controlling law from our previous cases and provide a coherent framework for future application.

Britt v. Wilmington provides that

[a]ny activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

. . . .

When a municipality is acting in behalf of the State in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it must be for a public purpose or public use.

So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and private when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality.

236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952) (citation and quotation marks omitted).

In applying the *Britt* test, this Court has held, charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary. However, a profit motive is not the sole determinative factor when deciding whether an activity is governmental or proprietary. Instead, courts look to see whether an undertaking is one traditionally provided by the local governmental units.

ESTATE OF WILLIAMS v. PASQUOTANK CNTY. PARKS & RECREATION DEP'T

(211 N.C. App. 627 (2011))

Willett, 176 N.C. App. at 270, 625 S.E.2d at 902 (citations, quotation marks, and brackets omitted). Thus, when considering whether a municipality has engaged in a governmental or a proprietary function, prior cases have considered: (1) “whether an undertaking is one *traditionally* provided by the local governmental units[;]” *id.* (emphasis added), (2) “[i]f the undertaking of the municipality is one in which *only* a governmental agency could engage” or if “any corporation, individual, or group of individuals could do the same thing[;]” *Britt*, 236 N.C. at 451, 73 S.E.2d at 293 (emphasis added), (3) whether the county charged “a substantial fee[;]” *Willett*, 176 N.C. App. at 270, 625 S.E.2d at 902, and (4) if a fee was charged, whether a profit was made. *See id.* Not all of these factors must be present for a function to be proprietary, but the second of these considerations is the most important. *See Evans* at 54, 602 S.E.2d at 671 (“We have provided various tests for determining into which category a particular activity falls, but have consistently recognized one guiding principle: Generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and private when any corporation, individual, or group of individuals could do the same thing.” (quotation marks and brackets omitted)).

Defendant describes Fun Junktion as a public park that “contained numerous facilities, including a pavilion, picnic tables, playground, and pond[.]” As to the first factor, whether the activity is one traditionally provided by local governments, *Willett*, 176 N.C. App. at 270, 625 S.E.2d at 902, certainly public parks are a function traditionally provided by the government. *See Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235 (“Certain activities are clearly governmental such as . . . public parks[.]”), *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

As to the second factor, it is equally clear that not all parks are operated by governmental units. “[A]ny corporation, individual, or group of individuals could” operate similar recreational facilities which may be rented for private use. *Britt*, 236 N.C. at 451, 73 S.E.2d at 293. While defendant appears to argue that all activities provided within a public park are governmental functions pursuant to N.C. Gen. Stat. § 160A-351, our Supreme Court has previously determined municipalities may perform proprietary functions within public parks. *See, e.g., Glenn v. Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957) (determining that a public park did not have governmental immunity from a rock thrown from a mower which hit the plaintiff on the head

D.P. SOLUTIONS, INC. v. XPLORE-TECH SERVS. PRIVATE LTD.

[211 N.C. App. 632 (2011)]

while he was sitting at a table in the public park). Thus, a public park may include activities which are governmental and protected by governmental immunity as well as proprietary functions which are not.

As to the third and fourth factors, defendant charged \$75.00 for the use of Fun Junktion for a private party but did not make a profit from the rental fees for Fun Junktion. Defendant states in its brief that “[f]or the fiscal year 1 July 2006 through 30 June 2007, Pasquotank County spent \$160,384 operating Fun Junktion and received only \$2,052 in revenues from its operation . . . , a ratio of revenue to expenditures of 1.3%.” Thus, defendant was involved in a traditional government function that could be performed by private entities and did so for a substantial fee although it did not make a profit. In weighing the application of the factors to this case, we are mindful that the second factor is the most important, as the “guiding principle” is “[i]t is proprietary and private when any corporation, individual, or group of individuals could do the same thing.” *Evans*, 359 N.C. at 54, 602 S.E.2d at 671. Accordingly, we conclude that defendant was involved in a proprietary function in the operation of the party facilities at Fun Junktion.

III. Conclusion

As we conclude that defendant was engaging in a proprietary function, we affirm the trial court’s denial of summary judgment.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

D.P. SOLUTIONS, INC., PLAINTIFF V. XPLORE-TECH SERVICES PRIVATE LIMITED,
PANKAJ DHANUKA AND KISHORE SARAOGI, DEFENDANTS

No. COA10-1229

(Filed 3 May 2011)

**Arbitration and Mediation— personal guarantee—arbitration
clause—agreement between plaintiff and corporate defendant**

The trial court did not err by concluding that individual defendants could not compel arbitration of a personal guarantee, made in their individual capacities, based on an arbitration clause in an agreement between corporate defendant and plaintiff.

D.P. SOLUTIONS, INC. v. XPLORE-TECH SERVS. PRIVATE LTD.

[211 N.C. App. 632 (2011)]

Appeal by Defendants from order entered 9 July 2010 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 24 February 2010.

Blanco Tackabery & Matamoros, P.A., by Elliot A. Fus, for Defendants.

Sharpless & Stavola, P.A., by Eugene E. Lester III, for Plaintiff.

THIGPEN, Judge.

The issue raised on this appeal is whether the individual defendants, Pankaj Dhanuka and Kishore Saraogi, can compel arbitration of personal guarantees, made in their individual capacity, based on the arbitration clause contained in a Share Purchase Agreement entered into between Plaintiff and the corporate defendant. We conclude they cannot and affirm the order of the trial court.

The evidence of record tends to show that DP Solutions, Inc. (“Plaintiff”) and Xplore-Tech¹ entered into a Share Purchase Agreement (“Agreement”) on 12 April 2007. The Agreement contained an arbitration clause. On 23 April 2007, Defendants Dhanuka and Saraogi entered into a Personal Guarantee of the Share Purchase Agreement² (“Guarantee”), which did not contain an arbitration clause. On 22 March 2010, Plaintiff filed a complaint alleging Defendant Xplore-Tech “failed and refused to pay [Plaintiff] the consideration for the transaction owed to [Plaintiff] under the Agreement in an amount in excess of \$3,200,000.” Plaintiff further alleged that “Pankaj Dhanuka and Kishore Saraogi personally guaranteed . . . payment of \$610,000 (USD) to [Plaintiff]” and that “[t]he total amount of \$610,000 has not been paid to [Plaintiff] as . . . guaranteed by Pankaj Dhanuka and Kishore Saraogi[.]” Plaintiffs also alleged that the court should “disregard [the] corporate entity,” Xplore-Tech.³

1. Pankaj Dhanuka and Kishore Saraogi are citizens and residents of India and also principals of Xplore-Tech (hereinafter, “Defendants Dhanuka and Saraogi,” “Defendant Xplore-Tech,” or collectively, “Defendants”).

2. The two contracts were not “contemporaneously executed written instruments[.]” *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969) (stating that “[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken”).

3. Defendants argue the “claim to impose all the alleged liability of Xplore-Tech under the [Agreement] to Dhanuka and Saraogi pursuant to an ‘alter ego’ theory . . .

D.P. SOLUTIONS, INC. v. XPLORE-TECH SERVS. PRIVATE LTD.

[211 N.C. App. 632 (2011)]

On 2 June 2010, Defendants filed a motion to dismiss and to compel arbitration or to stay the proceedings pending arbitration, arguing that the Agreement contained a dispute resolution clause, which stated that “[a]ny dispute which cannot be settled within 20 days of consultation, shall be submitted to arbitration at the request of any Party[.]” Defendants prayed that the court “place the case on inactive status” and “compel arbitration[.]”

On 9 July 2010, the trial court entered an order staying the breach of contract claim against Defendant Xplore-Tech and compelling arbitration “per Section 11.12 of the Share Purchase Agreement[.]” The order, however, decreed that Plaintiff’s remaining claims against Defendants Dhanuka and Saraogi were not stayed and would proceed to trial. From this order, Defendants appeal.⁴

Primarily we note that “[a]n order denying defendants’ motion to compel arbitration is not a final judgment and is interlocutory.” *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418, 637 S.E.2d 551, 554 (2006) (citation omitted). “However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed.” *Raper*, 180 N.C. App. at 418-19, 637 S.E.2d at 554.

“The question of whether a dispute is subject to arbitration is an issue for judicial determination.” *Revels v. Miss Am. Org.*, 165 N.C. App. 181, 188, 599 S.E.2d 54, 59, *disc. review denied*, 359 N.C. 191, 605 S.E.2d 153 (2004) (quotation omitted). “This determination involves a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.” *Id.* (quotation omitted).

should be governed by the [Agreement] and not by the Guarantee.” We agree. Any claim regarding the corporate entity, Defendant Xplore-Tech, including piercing the corporate veil, must necessarily have been made pursuant to the Agreement, which contained an arbitration clause, rather than the Guarantee, because Defendant Xplore-Tech was not a party to the Guarantee.

4. We note the trial court did not make findings of fact, and this Court has required that the findings of fact “state the grounds for the trial court’s denial of defendant’s motion to stay and compel arbitration.” *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 634, 610 S.E.2d 293, 296 (2005). However, Defendants do not argue in their brief that the findings of fact were deficient. “Issues not presented and discussed in a party’s brief are deemed abandoned.” N.C. R. App. 28(a) (2011). Moreover, “the evidence in the present case was simple, and the issue very clear.” *Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 729, 640 S.E.2d 840, 844 (2007). The question for the trial court was whether Defendants Dhanuka and Saraogi met the “threshold requirement [to] show the existence of an agreement to arbitrate.” *Id.*

D.P. SOLUTIONS, INC. v. XPLORE-TECH SERVS. PRIVATE LTD.

[211 N.C. App. 632 (2011)]

A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal.

Id. (quotation and citations omitted).

In the case *sub judice*, Defendants do not argue that the Guarantee contained an arbitration clause. Rather, Defendants' sole argument on appeal is that the arbitration clause in the Agreement between Plaintiff and Defendant Xplore-Tech should also apply to the personal Guarantee of Defendants Dhanuka and Saraogi.

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Evangelistic Outreach Ctr.*, 181 N.C. App. at 726, 640 S.E.2d at 843 (quotation omitted). "Because the duty to arbitrate is contractual, only those disputes which the parties agreed to submit to arbitration may be so resolved[;] [t]o determine whether the parties agreed to submit a particular dispute or claim to arbitration, we must look at the language in the agreement[.]" *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23-24, 331 S.E.2d 726, 731 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986) (quotations omitted).

"A *guaranty of payment* is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor." *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 145, 187 S.E.2d 752, 755 (1972). "The obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity." *Id.* (citation omitted) "The rights of the plaintiff against the guarantor arise out of the guaranty contract and must be based on the contract." *Hudson v. Game World*, 126 N.C. App. 139, 145-46, 484 S.E.2d 435, 440 (1997). "A guaranty is a special contract, and the guarantor is not in any sense a party to the note." *Coleman v. Fuller*, 105 N.C. 328, 330, 11 S.E. 175, 176 (1890).

D.P. SOLUTIONS, INC. v. XPLORE-TECH SERVS. PRIVATE LTD.

[211 N.C. App. 632 (2011)]

“When the language of a contract is clear and unambiguous, construction of the contract is a matter for the court.” *Self-Help Ventures Fund v. Custom Finish, LLC*, 199 N.C. App. 743, 747, 682 S.E.2d 746, 749 (2009), *appeal dismissed*, 363 N.C. 856, 694 S.E.2d 392 (2010) (quotation omitted). “It is a well-settled principle of legal construction that [i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.” *Id.* (quotation omitted).

Defendants cite *Ellison v. Alexander*, — N.C. App. —, —, 700 S.E.2d 102, 111 (2010), for the proposition that when the “alleged liability arises from [a defendant’s] actions as an agent of the corporate signatory to the arbitration agreement, [the] [d]efendant is entitled to enforce the arbitration clause.” *Ellison*, however, is distinguishable from this case. In *Ellison*, the “[p]laintiffs’ claims [were] predicated” on the defendant’s misrepresentations of facts “in his capacity as CEO and director in order to induce Plaintiffs to invest” in the corporate signatory, and the plaintiffs’ complaint “allege[d] actions taken by Defendant in his capacity as an officer and director” of the corporate signatory. *Ellison*, — N.C. App. at —, 700 S.E.2d at 111-12. Here, although Defendants Dhanuka and Saraogi contend they were acting as corporate agents, Defendants do not explain *how* they were acting as the corporate agents of Defendant Xplore-Tech when they entered into the Guarantee. Moreover, the express terms of the Guarantee state that Defendants Dhanuka and Saraogi were acting in their individual capacities:

If for any reason the amounts of \$500,000 within 90 days of the Signed Purchase Agreement and/or the amount not to exceed \$110,000 within 180 days of the signed Purchase Agreement are not paid by either Help Desk Now, Inc. or Xplore-Tech Services Private Limited, Punkaj Dhanuka and Kishore Saraogi will *personally* pay the amount(s) owed within 15 days of the dates that such unpaid amounts were to have been paid. This *personal* guarantee by both Punjak Dhanuka and Kishore Saraogi is provided to assure both DPSI and its Shareholders that have provided funding to Help Desk NOW, Inc., and that is to be repaid, that the amounts agreed upon will be paid. (Emphasis added).

The Guarantee further provides, without mention of arbitration, the following:

This unconditional *personal* guarantee from both *individuals*, if necessary, may be enforced in the courts of the U.S., India, or

STATE v. GOODE

[211 N.C. App. 637 (2011)]

both the U.S. and India, if necessary. All expenses associated with DPSI's and its Shareholders to collect on this Guarantee from the guarantors will be borne by the guarantors or be awarded to DPSI and the Shareholders *in a court of law*. (Emphasis added).

Based on the foregoing evidence, and because the law requires that “[t]he obligation of [a] guarantor is separate and independent of the obligation of the principal debtor[,]” *Wilson*, 281 N.C. at 145, 187 S.E.2d at 755, the parties’ rights “arise out of the guaranty contract and must be based on the contract[,]” *Hudson*, 126 N.C. App. at 145-46, 484 S.E.2d at 440, and this Court presumes “the parties intended what the language used clearly expresses[,]” *Self-Help Ventures Fund*, 199 N.C. App. at 747, 682 S.E.2d at 749, we hold that the trial court did not err by concluding Defendants Dhanuka and Saraogi could not compel arbitration of the personal Guarantee, made in their individual capacities, based on the arbitration clause in the Agreement between Defendant Xplore-Tech and Plaintiff.

AFFIRMED.

Judges STROUD and HUNTER, JR., concur.

STATE OF NORTH CAROLINA v. GEORGE EARL GOODE, JR, DEFENDANT

No. COA10-1258

(Filed 3 May 2011)

Sentencing— vacated death sentences—resentenced to consecutive life sentences

The trial court did not err in a first-degree murder case by imposing consecutive rather than concurrent sentences for life imprisonment after defendant’s two death sentences for first-degree murder were vacated and he was resentenced.

Appeal by defendant from judgments entered 1 April 2010 by Judge Robert H. Hobgood in Johnston County Superior Court. Heard in the Court of Appeals 7 March 2011.

STATE v. GOODE

[211 N.C. App. 637 (2011)]

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.

North Carolina Prisoner Legal Services, Inc., by Sarah Jessica Farber, for defendant-appellant.

MARTIN, Chief Judge.

On 19 November 1993, two judgments, each sentencing defendant to death, were entered in the Superior Court of Harnett County upon jury verdicts finding defendant guilty of the first-degree murders of Leon Batten and Margaret Batten and recommending that he be sentenced to death for each of those crimes. A third judgment, sentencing defendant to a consecutive term of imprisonment of forty (40) years, was entered upon a jury verdict finding him guilty of robbery with a dangerous weapon. The convictions and sentences were appealed to the North Carolina Supreme Court and were affirmed. *State v. Goode*, 341 N.C. 513, 461 S.E.3d 631 (1995).

Thereafter, defendant filed a Motion for Appropriate Relief in the Superior Court of Johnston County, which was denied by order entered 15 December 2004 after an evidentiary hearing. Defendant's petition to the North Carolina Supreme Court for writ of certiorari was denied 11 October 2007. *State v. Goode*, 361 N.C. 698, 652 S.E.2d 924 (2007).

On 12 October 2007, defendant filed a petition for habeas corpus in the United States District Court for the Eastern District of North Carolina. By order entered 21 October 2009, that court determined that defendant received ineffective assistance of counsel at the penalty phase of his trial and that he was sentenced to death in violation of his constitutional rights under the Sixth Amendment of the United States Constitution. The court issued its writ of habeas corpus vacating defendant's death sentences and providing "the State of North Carolina shall sentence petitioner to life imprisonment on each count of first-degree murder unless, within 180 days, the State of North Carolina initiates new sentencing proceedings against Goode." *Goode v. Branker*, No. 5:07-HC-02192-H, Docket No. 58 (E.D.N.C. 21 October 2009).

Following entry of that order, the State elected not to pursue the death penalty upon resentencing, leaving life imprisonment as the only permissible penalty for defendant's convictions of first degree

STATE v. GOODE

[211 N.C. App. 637 (2011)]

murder.¹ After a resentencing hearing, judgments were entered sentencing defendant to consecutive terms of life imprisonment for the murders of Leon and Margaret Batten. Defendant appeals.

The sole issue raised by this appeal is whether the trial court erred by imposing consecutive, rather than concurrent, sentences of life imprisonment. Defendant asserts the trial court had neither jurisdiction nor authority to impose the consecutive life sentences. We find no merit in his argument.

Two statutes apply to the issue before us. N.C.G.S. § 15A-1335 provides:

When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (2009). N.C.G.S. § 15A-2004(d) provides:

Notwithstanding any other provision of Article 100 of Chapter 15A of the General Statutes, the State may agree to accept a sentence of life imprisonment for a defendant . . . upon an order of resentencing by a court in a State or federal post-conviction proceeding. If the State exercises its discretion and does agree to accept a sentence of life imprisonment for the defendant, then the court shall impose a sentence of life imprisonment.

N.C. Gen. Stat. § 15A-2004(d) (2009).

Defendant's argument is essentially that because the original judgments did not specify that the death sentences were to be consecutive, they were made concurrent by operation of law, so that the mandate of N.C.G.S. § 15A-2004(d) required the trial court to impose concurrent sentences of life imprisonment and it had no authority or discretion to do otherwise. We disagree.

First, we observe there is no question the trial court had personal jurisdiction over the defendant and subject matter jurisdiction to enter judgment in these cases. Indeed, defendant cites no authority to

1. At the time of the murders committed by defendant, the only permissible sentences for first degree murder were death and life imprisonment as defined by the Fair Sentencing Act N.C.G.S. § 15A-1340.4 (1993) (repealed 1995).

STATE v. GOODE

[211 N.C. App. 637 (2011)]

the contrary. North Carolina courts have personal jurisdiction over those who commit crimes within the borders of the state, and the Superior Court has original general jurisdiction throughout the State. N.C. Const. art. IV, § 12(4).

As for his argument that the trial court had no authority to “modify” the original judgments, which defendant contends mandated concurrent sentences, we observe that there was no modification of the judgments; the judgments were vacated by the federal court order. Thus, the matter before the court at the resentencing hearing was the entry of new judgments in accordance with the provisions of the applicable statutes recited above.

Pursuant to N.C.G.S. § 15A-2004(d), the State exercised its discretion to not seek the death penalty for the murder of either victim. Thus, the statute required only that the trial court impose a sentence of life imprisonment in each case; contrary to defendant’s assertion, the statute imposed no “curb” upon judicial discretion as to whether the sentences were to be concurrent or consecutive. Restraint, if any, upon that discretion would have to be imposed by the provision of N.C.G.S. § 15A-1335 that the sentence imposed upon resentencing be no more severe than the original sentence.

This Court has held that “[a]ny number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence, because ‘the penalty of death is qualitatively different from a sentence of imprisonment, however long.’” *State v. Oliver*, 155 N.C. App. 209, 212, 573 S.E.2d 257, 259 (2002) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976)), *appeal dismissed and disc. review denied*, 367 N.C. 254, 583 S.E.2d 45 (2003).

In *Oliver*, just as in the present case, the defendant’s two life sentences for first-degree murder were vacated and he was resentenced to consecutive sentences of life imprisonment. *Id.* at 210, 573 S.E.2d at 258. The defendant in *Oliver* argued that, because the trial court originally had not indicated in its judgment whether the two death sentences were to run concurrently or consecutively, they were legally presumed to run concurrently and thus, upon resentencing, he could only be sentenced to concurrent life sentences if the State did not choose to seek death sentences upon resentencing. *Id.* at 210-11, 575 S.E.2d at 258. This Court disagreed and affirmed the trial court’s imposition of two consecutive life sentences. *Oliver* is binding authority in the present case.

GENTRY v. BIG CREEK UNDERGROUND UTILS., INC.

[211 N.C. App. 641 (2011)]

We have carefully considered defendant's remaining arguments and conclude they are likewise without merit.

Affirmed.

Judges McGEE and McCULLOUGH concur.

PAM GENTRY, ADMINISTRATRIX OF THE ESTATE OF JOEY MICHAEL
QUESENBERRY, PLAINTIFF V. BIG CREEK UNDERGROUND UTILITIES, INC., AND
iSURITY, INC., DEFENDANTS

No. COA10-550

(Filed 3 May 2011)

1. Wrongful Death— Woodson claim—inapplicable to any party other than employer

The trial court did not err in a wrongful death case by granting summary judgment in favor of defendant insurance carrier and dismissing plaintiff's complaint. Defendant was never the employer and thus plaintiff could not state a *Woodson* claim against this defendant.

2. Appeal and Error— violation of North Carolina Rules of Appellate Procedure—denial of sanctions—not substantial or gross violations

Defendant's motion for sanctions against plaintiff based on numerous violations of the North Carolina Rules of Appellate Procedure was denied because review was not impaired nor had the adversarial process been frustrated when the violations were neither substantial nor gross.

Appeal by plaintiff from order entered 29 October 2009 by Judge Ripley E. Rand in Superior Court, Surry County. Heard in the Court of Appeals 16 November 2010.

Franklin Smith, for plaintiff-appellant.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Stephen G. Teague, for defendant-appellee.

STROUD, Judge.

GENTRY v. BIG CREEK UNDERGROUND UTILS., INC.

[211 N.C. App. 641 (2011)]

Defendant iSurety, Inc. filed a motion for summary judgment which the trial court subsequently allowed. Plaintiff appeals, arguing that it has presented a valid *Woodson* claim. As plaintiff's employer is not a party to this action, *Woodson* is inapplicable. Accordingly, we affirm the trial court's allowance of the motion for summary judgment in favor of defendant iSurety, Inc.

I. Background

As this case has a long procedural history, including previous opinions from this Court, we recite only those facts which are necessary for an understanding of the present appeal before this Court. Plaintiff alleged that on 21 June 2002, Mr. Joey Michael Quesenberry, was working for Big Creek Underground Utilities, Inc. ("Big Creek") and operating a ditch digger to bury underground cable, when he was run over by the ditch digger and his left leg was broken in four places. Mr. Quesenberry filed a worker's compensation claim against Big Creek and received medical treatment for his leg injury, although his contentions in this case focus primarily on the alleged inadequacy of medical care provided under his worker's compensation claim. On 2 April 2005, Mr. Quesenberry died from hypertensive cardiomyopathy. On 14 March 2007, Ms. Pam Gentry, administratrix for Mr. Quesenberry's estate, brought this action for wrongful death, alleging that defendants intentionally and maliciously refused to provide necessary medical care to Mr. Quesenberry although they knew that the failure to provide this care would lead to further injury or death.

On 9 October 2009, defendant iSurety, Inc. ("iSurety"), Big Creek's insurance carrier, filed a motion for summary judgment. On 29 October 2009, the trial court allowed iSurety's motion for summary judgment and dismissed plaintiff's complaint with prejudice. On 6 November 2009, plaintiff filed a notice of appeal from the summary judgment order. On 3 May 2010, plaintiff and iSurety entered into a stipulation that Big Creek had never been properly served and thus "[t]he Order granting summary judgment was a final judgment as to all parties, leaving no outstanding or unadjudicated claims pending against iSurety, Inc. and/or any other party or entity." Thus, only iSurety remains as the defendant in this case.

II. Summary Judgment

[1] Plaintiff first contends that the trial court erroneously allowed defendant's motion for summary judgment and dismissed its complaint because "[t]he case at hand clearly falls within the scope of

GENTRY v. BIG CREEK UNDERGROUND UTILS., INC.

[211 N.C. App. 641 (2011)]

Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222” (1991). “Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

The elements of a *Woodson* claim are: (1) misconduct *by the employer*; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct.

Pastva v. Naegele Outdoor Adver., Inc., 121 N.C. App. 656, 659, 468 S.E.2d 491, 494 (emphasis added), *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996). The only defendant remaining in this action is iSurety, Inc., plaintiff’s employer’s insurance carrier. Plaintiff has not identified, nor can we find, any North Carolina case which has recognized a *Woodson* claim as applicable to any party other than the employer. Defendant iSurety, Inc. was never defendant’s employer and plaintiff cannot state a *Woodson* claim against this defendant. *See id.* The trial court therefore properly granted defendant’s motion for summary judgment.

III. Motion for Sanctions

[2] Defendant filed a motion with this Court for sanctions against plaintiff. Defendant notes numerous failures to comply with the North Carolina Rules of Appellate Procedure in plaintiff’s *brief* including violations of Rules 26(g)(1)-(2) and 28(b)(4)-(7). “In *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, our Supreme Court set out the proper analysis for this Court to use when a party fails to comply with the Rules of Appellate Procedure in some respect which does not deprive this Court of jurisdiction[.]” *Honeycutt v. Honeycutt*, — N.C. App. —, —, 701 S.E.2d 689, 691 (2010), such as those violations of which defendant complains. *See Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (“The final principal category of default involves a party’s failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules. . . . Two examples of such rules are those at issue in the present case: Rule 10(c)(1), which directs the form of assignments of error, and Rule 28(b), which governs the content of the appellant’s brief.” (emphasis added)).

GENTRY v. BIG CREEK UNDERGROUND UTILS., INC.

[211 N.C. App. 641 (2011)]

Based on the language of Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a "substantial failure" or "gross violation." In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.

. . . .

In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.

Id. at 199-200, 657 S.E.2d at 366-67. As our review has not been impaired nor has the adversarial process been frustrated, we conclude that the violations of which defendant complains of are neither substantial nor gross and as such we will not impose sanctions. *See id.* Accordingly, we deny defendant's motion for sanctions.

IV. Conclusion

As plaintiff's employer is not a party to this action, plaintiff has no *Woodson* claim. As plaintiff cannot bring the claim asserted and as plaintiff's other issue on appeal regarding the record cannot have any bearing on the outcome, we will not address it. Accordingly, we affirm.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MAY 2011)

CAMPBELL v. CAMPBELL No. 10-369	Mecklenburg (06CVD2925)	Reversed in part; vacated and remanded in part
COLVIN v. WAKE CNTY. No. 10-792	Indus. Comm. (696584)	Affirmed
CORY v. DEBBIE'S STAFFING SERVS., INC. No. 10-615	Indus. Comm. (895393)	Affirmed
HOLDEN v. BRICKEY ACOUSTICAL, INC. No. 10-901	Indus. Comm. (595281)	Affirmed in Part, Reversed and remanded in part
HUNTER v. BOWDEN No. 10-1391	Guilford (10CVS3495)	Dismissed
HUNTER v. HARRIS No. 10-1392	Guilford (10CVS3496)	Dismissed
IN RE D.T.H. No. 10-1403	Yancey (09J22)	Affirmed
IN RE D.Z.B. No. 10-1270	Edgecombe (08JT143)	Reversed
IN RE H.K.L. No. 10-1478	Randolph (07JA206)	Reversed and remanded in part; affirmed in part
IN RE J.T.K. No. 10-1215	Wayne (10JB16)	Affirmed
IN RE L.H. No. 10-1398	Wake (09JA35)	Affirmed
IN RE S.G. No. 10-1495	Alleghany (09JA4-7)	Affirmed
IN RE V.A.S. No. 10-1308	Henderson (05JT37-38) (08JT69)	Affirmed
JAMES v. FIRST NAT'L INS. CO. OF AM. No. 10-706	Caswell (09CVS115)	Affirmed

JOINES v. JOINES No. 10-951	Alleghany (08CVS305)	Affirmed
SMITH v. GUY C. LEE BLDG. MATERIALS No. 10-1286	Indus. Comm. (784900) (907581)	Affirmed
STATE v. BARNETT No. 10-1161	Iredell (08CRS57926)	No Error
STATE v. BENNETT No. 10-1164	Forsyth (07CRS62260)	Affirmed
STATE v. BOBBITT No. 10-826	Guilford (08CRS104579-81)	No Error
STATE v. CAMARATA No. 10-853	Johnston (07CRS54521)	Affirmed
STATE v. CLARK No. 10-980	Buncombe (07CRS52983)	No Error
STATE v. DAVIS No. 10-1080	Sampson (08CRS52018)	No Error
STATE v. FLINT No. 10-845	New Hanover (05CRS20449) (06CRS54021) (06CRS54023)	Dismissed
STATE v. FOUST No. 10-1083	Alamance (09CRS2908) (09CRS51385) (09CRS51583)	No Error
STATE v. HAYMOND No. 10-1050	Wilkes (07CRS50460) (08CRS108) (08CRS1470-75)	Affirmed
STATE v. LITTLE No. 10-479	Davidson (08CRS58591)	Affirmed
STATE v. MAXWELL No. 10-1081	Cabarrus (08CRS52457)	New trial in part; remanded for resentencing in part
STATE v. MCINTOSH No. 10-1165	Forsyth (09CRS60596)	No Error

STATE v. MCLEOD No. 10-157	Moore (06CRS5752)	Affirmed in part; reversed and remanded in part
STATE v. MIDGETTE No. 10-953	Beaufort (09CRS51520)	No error in part, dismissed in part.
STATE v. MILLS No. 10-820	Buncombe (08CRS57085) (09CRS44-45)	No Error
STATE v. ORELLANA No. 10-427	Forsyth (07CRS30329) (05CRS65269)	Affirmed
STATE v. ROSEBORO No. 10-418	Guilford (09CRS86302) (09CRS82899-900)	Vacated and Remanded
STATE v. SEBASTIAN No. 10-884	Davidson (10CRS796-797)	Affirmed
STATE v. SMITH No. 10-1131	Pitt (09CRS6643-44) (09CRS6646-47)	No Error
STATE v. WHITE No. 10-949	Durham (07CRS52196-97)	Affirmed in part; Dismissed in part
STATE v. WILKES No. 10-765	Wilson (07CRS54285) (07CRS54293) (08CRS3568)	No Error in Part; Dismissed in Part
STONEWORX, INC. v. ROBBINS No. 10-928	Nash (07CVD1648)	Affirmed
TREADWAY v. DIEZ No. 10-887	Buncombe (08CVS6291) (08CVS6294)	Affirmed
TRI-ARC FOOD SYS., INC. v. TOWNS No. 10-746	Wake (09CVS16547)	Affirmed
VICKERS v. STREET No. 10-1016	Rutherford (08CVS651)	Affirmed
WILLIAMSON v. WINDSOR HOUSE ONE, LLC No. 10-594	Bertie (09CVS314)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW	PRETRIAL PROCEEDINGS
APPEAL AND ERROR	PROCESS AND SERVICE
ARBITRATION AND MEDIATION	PUBLIC OFFICERS AND EMPLOYEES
ASSAULT	PUBLIC RECORDS
ATTORNEY FEES	
	REAL ESTATE
BROKERS	
	SATELLITE-BASED MONITORING
CHILD CUSTODY AND SUPPORT	SENTENCING
CHILD VISITATION	SEXUAL OFFENDERS
CIVIL PROCEDURE	SEXUAL OFFENSES
CONFESSIONS AND INCRIMINATING STATEMENTS	STATUTES OF LIMITATION AND REPOSE
CONSTITUTIONAL LAW	
CONTRACTS	TORT CLAIMS ACT
CORPORATIONS	TRIALS
CREDITORS AND DEBTORS	TRUSTS
CRIMINAL LAW	
	UNFAIR TRADE PRACTICES
DAMAGES AND REMEDIES	UNIFORM COMMERCIAL CODE
DECLARATORY JUDGMENTS	UNJUST ENRICHMENT
DIVORCE	
DRUGS	WATERS AND ADJOINING LANDS
	WORKERS' COMPENSATION
EMPLOYER AND EMPLOYEE	WRONGFUL DEATH
EVIDENCE	
FIREARMS AND OTHER WEAPONS	
FRAUD	
HIGHWAYS AND STREETS	
HOMICIDE	
HOSPITALS AND OTHER MEDICAL FACILITIES	
IMMUNITY	
INDICTMENT AND INFORMATION	
JURISDICTION	
JURY	
JUVENILES	
MEDICAL MALPRACTICE	
MORTGAGES AND DEEDS OF TRUST	
NEGLIGENCE	

ADMINISTRATIVE LAW

Board of Adjustment—Certificate of Appropriateness—denial not based on vistas—Petitioner's argument that the Beaufort Historic Preservation Commission's (BHPC) decision to deny respondent Smith a Certificate of Appropriateness should have been upheld because Smith's application violated BHPC guidelines protecting the historic district's "vistas" was overruled. The BHPC did not reach its decision to deny Smith's application on the basis of any guidelines regulating vistas. **Sanchez v. Town of Beaufort**, 574.

Board of Adjustment—Certificate of Appropriateness—height requirement—arbitrary and capricious—The Board of Adjustment did not err by reversing the decision of the Beaufort Historic Preservation Commission (BHPC) and ordering the BHPC to issue respondent Smith a Certificate of Appropriateness for the structure Smith proposed to build. The height requirement imposed by the BHPC was arbitrary and capricious. **Sanchez v. Town of Beaufort**, 574.

Exhaustion of administrative remedies—not required—inverse condemnation compensation—The trial court did not err by concluding that plaintiffs had no administrative remedies to exhaust before bringing their inverse condemnation claim against defendant. Plaintiffs were not challenging the Environmental Management Commission certificate or defendants' right to exercise eminent domain, but were asking only to be compensated as a result of the diverted waters. **L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.**, 148.

Standard of review—unemployment insurance benefits—The superior court applied an improper standard of review when reversing the Employment Security Commission's (ESC) decision to disqualify claimant from unemployment insurance benefits. The order setting aside the ESC's decision was vacated and remanded to the superior court for review utilizing the correct standard of review. **Edgecombe Cnty. Dep't of Soc. Servs. v. Hickman**, 176.

APPEAL AND ERROR

Execution proceedings—issue rendered moot—Defendant's argument that the trial court erred in denying his motion to dismiss execution proceedings against him in a construction loan case was rendered moot where the Court of Appeals determined that the trial court properly denied defendant's motion to set aside the entry of default and properly granted summary judgment against defendants. **Jones v. Wallis**, 353.

Hearsay—no objection or motion to strike—not considered—The question of whether an investigator's testimony was hearsay was reviewed only as plain error where defendant never objected to or moved to strike the testimony on hearsay grounds. **There was no plain error. State v. Cobos**, 536.

Interlocutory orders and appeals—certified by trial court—immediately reviewable—Plaintiff's appeal from the trial court's order in a medical malpractice case which was only final as to some of the parties was immediately reviewable as the trial court properly certified the appeal pursuant to Rule 54(b). **Stinchcomb v. Presbyterian Med. Care Corp.**, 556.

Interlocutory orders and appeals—substantial right—Although the trial court's order was interlocutory since it left the amount of compensation to be resolved, orders under N.C.G.S. § 40A-47 are immediately appealable as affecting a substantial right. **L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.**, 148.

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—substantial right—immediately appealable—Defendants' appeal from the trial court's order denying their motion for summary judgment in a defamation per se and unfair and deceptive trade practices case affected a substantial right and was immediately appealable. **Boyce & Isley, PLLC v. Cooper**, 469.

Notice of appeal—satellite-based monitoring—written notice required—An oral notice of appeal was not sufficient to confer appellate jurisdiction to review a satellite-based monitoring (SBM) order because SBM is civil rather than criminal in nature. Although defendant noted his appeal orally rather than in writing, his motion for *certiorari* was granted because of the uncertainty about the proper method of appealing SBM orders at the time. **State v. Clark**, 60.

Preservation of issues—constitutional issue—not raised below—not considered—A Confrontation Clause issue was not properly before the Court of Appeals where it was not presented to the trial court below. **State v. Cobos**, 536.

Preservation of issues—denial of second motion to dismiss—The denial of a motion to dismiss evidence of illegal drugs seized from defendant and his car at a checkpoint was not properly before the Court of Appeals where a prior motion on the constitutionality of the checkpoint was denied and the second motion, on the seizure itself, was not ruled upon. Defendant did not challenge the trial court's failure to rule on the second motion or provide a reason for granting it not related to the first. **State v. Nolan**, 109.

Preservation of issues—failure to raise at trial—Although defendant contended that plaintiff's proper cause of action was for rescission of the parties' contract based on mutual mistake of fact, defendant failed to preserve this issue since he did not raise it at trial as required by N.C. R. App. P. 10(a)(1). **Majewski Enters., Inc. v. The Park at Langston, Inc.**, 525.

Revocation of driver's license—outside scope of judgment appealed—Defendant's contention that his driver's license was revoked without due process was not properly before the Court of Appeals because it was outside the scope of the judgment being appealed. **State v. Leyshon**, 511.

Sentencing—no appeal as of right—Defendant's argument that he was entitled to a new sentencing hearing was not addressed. Defendant was not entitled to appeal the sentencing issue as a matter of right because he would have been a prior record level II with or without the challenged sentencing point and he was sentenced in the presumptive range. **State v. McLean**, 321.

Standard of review—violation of Open Meetings Law—de novo—appropriate remedy—abuse of discretion—The Court of Appeals applied a *de novo* standard of review to the issue of whether a violation of the Open Meetings Law (OML) occurred. The Court of Appeals reviewed the trial court's determination of the appropriate remedy for violation of the OML for abuse of discretion. **Garlock v. Wake Cnty. Bd. of Educ.**, 200.

Violation of North Carolina Rules of Appellate Procedure—denial of sanctions—not substantial or gross violations—Defendant's motion for sanctions against plaintiff based on numerous violations of the North Carolina Rules of Appellate Procedure was denied because review was not impaired nor had the adversarial process been frustrated when the violations were neither substantial nor gross. **Gentry v. Big Creek Underground Utils., Inc.**, 641.

ARBITRATION AND MEDIATION

Motion for rehearing denied—trial court familiarity—The trial court did not abuse its discretion by denying defendants' motion for rehearing concerning the issue of arbitration upon remand from the Court of Appeals in light of the trial court's familiarity with the case. **U.S. Trust Co., N.A. v. Rich, 168.**

Motion to stay litigation—motion to compel arbitration—associated person—The trial court did not err by denying defendants' motion to stay litigation and compel arbitration. Plaintiff did not qualify as an "associated person" under Financial Industry Regulatory Authority (FINRA) code of Arbitration Procedure for Industry Disputes or FINRA Bylaws, and plaintiff was not a third-party beneficiary of defendants' Form U-4s. **U.S. Trust Co., N.A. v. Rich, 168.**

Personal guarantee—arbitration clause—agreement between plaintiff and corporate defendant—The trial court did not err by concluding that individual defendants could not compel arbitration of a personal guarantee, made in their individual capacities, based on an arbitration clause in an agreement between corporate defendant and plaintiff. **D.P. Soutions, Inc. v. Xplore-Tech Servs., 632.**

ASSAULT

Deadly weapon inflicting serious injury—jury instruction—definition of serious injury—no error—The trial court did not err as a matter of law in an assault with a deadly weapon with intent to kill inflicting serious injury case by failing to define "serious injury" in its jury instructions. Our courts have chosen not to narrowly define "serious injury" in the context of assaults, and the trial court was not required to define the term as requested by defendant. **State v. McLean, 321.**

Deadly weapon inflicting serious injury—sufficient evidence—The trial court erred as a matter of law in denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. There was sufficient evidence of all elements of the crime including that the victim sustained a serious injury. **State v. McLean, 321.**

ATTORNEY FEES

Professional negligence—findings of fact—supported award—The trial court did not err in a professional negligence case by not including an additional \$62,202.84 over and above the amount ordered by the trial court that was paid by plaintiffs individually as part of a \$300,000 settlement. The findings supported the amount of the trial court's award to plaintiffs individually. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC, 295.**

Workers' compensation—stubborn unfounded litigiousness—The Industrial Commission erred in a workers' compensation case by finding that the defense of this claim was reasonable and not stubborn, unfounded litigiousness where the findings of fact and conclusions of law ignored certain evidence and declined to award attorney fees under N.C.G.S. § 97-88.1. The case was remanded for a determination of the amount of attorney fees. **Cawthorn v. Mission Hosp., Inc., 42.**

BROKERS

Dual brokerage—planned adjacent development—duty to disclose—In a coastal real estate sale involving a dual brokerage, the broker had a duty to make

BROKERS—Continued

a full and truthful disclosure to plaintiffs of all material facts known to the broker or discoverable by the broker with reasonable diligence, with a non-disclosed fact being material when it would have influenced the parties' decision in entering the contract. The property in this case had an unobstructed view of the ocean over an undeveloped tract that would soon be developed by the owners of the real estate agency and others. **Sutton v. Driver, 92.**

CHILD CUSTODY AND SUPPORT

Custody awarded to grandmother—no findings or conclusions—father acted inconsistently with parental rights—The trial court erred in awarding permanent custody of a minor child to her maternal grandmother where the court specifically found that neither of the child's parents was unfit to parent and the trial court failed to make any findings of fact or conclusions of law as to whether respondent father had acted inconsistently with his parental rights. **In re D.M., 382.**

Foreign custody order—modification—substantial change in circumstances—best interests of child—The trial court did not abuse its discretion by modifying a Michigan child custody order. The evidence revealed substantial changes in circumstances affecting the welfare of the minor children and that modification was in the best interests of the children. **Crenshaw v. Williams, 136.**

Foreign support order—improper modification—The trial court lacked authority to modify a Michigan child support order, and the portion of the trial court's order modifying defendant mother's support obligation was reversed. **Crenshaw v. Williams, 136.**

Grandparents—standing—custody distinguished from visitation—Plaintiffs had standing to proceed in an action for custody pursuant to N.C.G.S. § 50-13.1(a) where they alleged they were the grandparents of the children and that defendant had acted inconsistently with her parental status and was unfit because she had neglected the children. A grandparent's claim for visitation may be different from a custody claim and has different standing requirements. **Rodriguez v. Rodriguez, 267.**

Order reversed and remanded—findings—reunification –visitation—The Court of Appeals reversed an order granting custody of a minor child to her maternal grandmother and remanded the case to the trial court. On remand, the trial court was to address any efforts made by the Department of Social Services to reunite the child with her father. Furthermore, if the trial court did not return the child to her father's home and instead granted him visitation privileges, the trial court was to set forth the time, place, and conditions of his visitation privileges. **In re D.M., 382.**

Subject matter jurisdiction—prior juvenile matter terminated—The trial court had subject matter jurisdiction to consider a custody claim by grandparents where a prior juvenile matter was terminated by a juvenile review order that placed the physical and legal custody of the children with defendant, ended the involvement of both DSS and the Guardian *ad Litem* program, and included no provisions requiring ongoing supervision or court involvement. **Rodriguez v. Rodriguez, 267.**

CHILD VISITATION

Custody—actions not inconsistent with parental status—The trial court erred by concluding that defendant had acted inconsistently with her parental status and by awarding plaintiffs visitation where defendant did not voluntarily cede parental authority to another party; a finding that defendant's children had been adjudicated dependent in an earlier proceeding was not alone sufficient to establish that defendant acted in a manner inconsistent with her parental status; the trial court's findings did not indicate that defendant had voluntarily engaged in conduct that would trigger the forfeiture of her protected status; and additional findings that could reflect badly on defendant were not sufficient to show conduct inconsistent with being a parent or that she was unfit as a parent. **Rodriguez v. Rodriguez, 267.**

CIVIL PROCEDURE

Motion to stay proceedings—not addressed—Plaintiff's contention that the trial court erred in a medical malpractice action by denying his motion to stay proceedings against the nurse defendants was not addressed in light of the Court of Appeals' determination that plaintiff's appeal from the dismissal of other defendants lacked merit. **Stinchcomb v. Presbyterian Med. Care Corp., 556.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Statements to detective—voluntary—The trial court did not err by denying a first-degree rape defendant's motion to suppress statements he made to a detective before he was given *Miranda* warnings. Although defendant was told to wait at a patrol car at the scene, this amounted only to an attempt by officers to control the scene and prevent emotional encounters between a suspect and the victim's family. The detective who took the statements directly and clearly informed defendant that he was not under arrest, defendant repeatedly asked to speak with the detective, and defendant voluntarily accompanied the detective to the sheriff's department. **State v. Clark, 60.**

CONSTITUTIONAL LAW

Due process—capacity to proceed—hearing after examination—local hearing—Defendant's due process rights were not violated in a driving while license revoked case because N.C.G.S. § 15A-1002 did not require the court to conduct a hearing *before* ordering an examination of defendant's capacity to proceed and defendant did not request a hearing after his examination was completed. Furthermore, although the trial court erred by ordering defendant, who was charged only with a misdemeanor, committed to a state facility to determine his capacity to proceed before he had a local examination, the issue was moot because the terms of the challenged trial court order had already been carried out. **State v. Leyshon, 511.**

Effective assistance of counsel—counsel's admission to prior convictions—no reasonable likelihood of different outcome—Defendant did not receive ineffective assistance of counsel at a hearing to determine if he had attained habitual felon status. Defense counsel's admission that defendant had three prior felony convictions did not violate *State v. Harbison*, 315 N.C. 175, and the *Harbison* rule does not apply to sentencing proceedings. Furthermore, even assuming *arguendo* that defense counsel's representation was deficient, there was no reasonable likelihood that the outcome at defendant's habitual felon pro-

CONSTITUTIONAL LAW—Continued

ceeding would have been different had his trial counsel not made the challenged comment. **State v. Womack, 309.**

Effective assistance of counsel—counsel's statement—no reasonable likelihood of different outcome—Defendant did not receive ineffective assistance of counsel at a sentencing hearing for his conviction of possession of drugs. Defense counsel's challenged statement was nothing more than a slip of the tongue and the isolated statement, taken in context, did not constitute deficient performance. **State v. Womack, 309.**

Ex post facto—ineffective assistance of counsel—not available for satellite-based monitoring claims—Ineffective assistance of counsel claims are not available to satellite-based monitoring (SBM) defendants because SBM is civil in nature. Moreover, any *ex post facto* claim defendant's lawyer might have raised would not have been successful for the same reason. **State v. Clark, 60.**

Motion for speedy trial—motion filed by defendant personally—represented by counsel—A trial court could consider a speedy trial motion filed by a defendant personally even though the defendant was represented by counsel. **State v. Howell, 613.**

Right to counsel—no waiver—forfeiture—The trial court in a driving while license revoked case did not err by appointing counsel against defendant's wishes and then proceeding without defendant's appointed counsel. Defendant had not clearly and unequivocally waived his right to counsel before the appointment and defendant then forfeited his right to counsel by his behavior. **State v. Leyshon, 511.**

Right to speedy trial—any delay caused by defendant—The trial court did not violate defendant's constitutional right to a speedy trial in a driving while license revoked case. Any delay in defendant's trial was caused by defendant's failure to state whether he asserted or waived his right to counsel. **State v. Leyshon, 511.**

Speedy trial—constitutional or statutory basis uncertain—A trial court order dismissing charges against a defendant for speedy trial violations was remanded where the grounds for the dismissal could not be determined from the record. While it seemed evident that the trial court based its ruling at least in part on a violation of defendant's constitutional right to a speedy trial, it was not evident whether the court also based its decision in part on potential statutory violations. It was noted that N.C.G.S. § 15A-711 does not guarantee a right to trial within a specific time and that a violation of the statute is not a violation of the Sixth Amendment right to a speedy trial. **State v. Howell, 613.**

Speedy trial—time of denial impossible to determine—analysis of all Barker factors required—The trial court relied upon an incorrect standard in ruling on defendant's motion to dismiss for violation of his constitutional speedy trial rights where the trial court believed that dismissal was the only possible remedy when it was impossible to determine precisely when the right had been denied. In order to conclude that there has been a Sixth Amendment violation of a defendant's right to a speedy trial, the court must examine and consider all of the factors in *Barker v. Wingo*, 407 U.S. 514. Reliance on headnotes rather than holdings was cautioned against. **State v. Howell, 613.**

CONTRACTS

Construction of boat—delayed completion—The trial court did not err by granting plaintiff's motion for partial summary judgment and by denying defendants' motion for summary judgment on a breach of contract claim involving the construction of a 57-foot sport fishing boat that was finished late and sold to another buyer. Contrary to defendants' allegation, plaintiff did not declare defendants in default after being notified that completion would be delayed, and did not insist on closing on the specified date. **D.G. II, LLC v. Nix, 332.**

CORPORATIONS

Real estate development companies—not alter egos of realtor owners—Real estate development companies were not the *alter egos* of two defendants who owned a real estate brokerage and who were partial owners of the development companies where the owners of the development companies were not acting as agents for the development company when dealing with plaintiffs. The action arose from plaintiffs' purchase through the brokerage of a coastal property with an ocean view across a tract that was about to be developed. **Sutton v. Driver, 92.**

CREDITORS AND DEBTORS

Foreclosure—challenge—dismissed without prejudice—Plaintiffs' challenge to a foreclosure proceeding pursuant to N.C.G.S. § 45-21.34 was effectively dismissed without prejudice by virtue of a consent order. N.C.G.S. § 45-21.34 could not, therefore, be a basis for reversing the trial court's grant of summary judgment to defendants. **Harty v. Underhill, 546.**

Objection to claim for exempt property—merits not addressed—remanded to trial court—The Court of Appeals declined to rule on the merits of plaintiff's argument that the trial court erred by allowing defendant to claim exempt property in excess of that allowed by N.C.G.S. § 1C-1601. The matter was remanded to the trial court for consideration. **Stewart v. Hodge, 605.**

Objection to claim for exempt property—timely—The trial court erred in an action arising from an unpaid debt by determining that plaintiff did not object to defendant's claim for exempt property in a timely manner. Given the issuance of a written notice of hearing within the specified time period, plaintiff adequately complied with N.C.G.S. § 1C-1603(e)(5). **Stewart v. Hodge, 605.**

CRIMINAL LAW

Denial of requested instruction—denied opportunity to investigate or learn through reasonable diligence—Although defendant contended that the trial court erred by refusing his request to instruct the jury that plaintiff must prove that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence, defendant failed to demonstrate that the trial court's instruction likely misled the jury. **Walker v. Town of Stoneville, 24.**

Traffic checkpoint—constitutionally reasonable—The trial court correctly determined that a traffic checkpoint was reasonable where the court applied the three-prong test of *Brown v. Texas*, 443 U.S. 47, and considered the gravity of the public concerns, the degree to which the public interest was advanced and to which the checkpoint was tailored to fit its primary purpose, and the severity of the interference with individual liberty. **State v. Nolan, 109.**

CRIMINAL LAW—Continued

Traffic checkpoint—primary programmatic purpose—constitutional—The trial court properly determined that the primary programmatic purpose of a traffic checkpoint was constitutionally permissible when the evidence was considered in its entirety, including the written plan as well as the officers' conflicting testimony. **State v. Nolan**, 109.

DAMAGES AND REMEDIES

Amount and certainty—enforceable oral contract—excessive water and sewer credits—The trial court did not err by finding that plaintiff had an enforceable oral contract with its builders such that damages based on defendant's receipt of excessive water and sewer credits could be properly awarded. However, the case was remanded for further findings specifically determining the damages plaintiff had suffered thus far, for findings related to the certainty of damages that may later arise, and for entry of judgment for the amount of damages which had been established with reasonable certainty. **Majewski Enters., Inc. v. The Park at Langston, Inc.**, 525.

Calculation of compensation—capitalization of income approach—partial taking—The trial court did not err by concluding that the capitalization of income approach used by the trial court was a reasonable method to calculate plaintiffs' compensation for a partial taking. **L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.**, 148.

Compensatory damages—causal connection—The trial court did not err by submitting the issue of compensatory damages to the jury. The record did not establish that any claims adjudication procedure existed at the time the issue of damages was submitted to the jury. Further, plaintiff established a causal connection between defendants' conduct and the unpaid *ad valorem* tax amounts. **Bogovich v. Embassy Club of Sedgfield, Inc.**, 1.

Negligence—calculation of property's value—fair market value—The Industrial Commission erred in a negligence action, arising from defendant's issuance of a septic permit and then its later determination that the lot was unsuitable for a septic system, by using fair market values of the pertinent property from 2007 rather than 2001 for calculating damages. The injury to plaintiff's real property was completed as of 14 February 2001, and there was not a continuing wrong or intermittent or recurring damages. **Feierstein v. N.C. Dep't of Env't & Natural Res.**, 194.

Punitive damages—constructive fraud—The trial court did not err by submitting to the jury the issue of whether plaintiff was entitled to recover punitive damages from defendant individuals. Punitive damages are justified in cases of constructive fraud. **Bogovich v. Embassy Club of Sedgfield, Inc.**, 1.

DECLARATORY JUDGMENTS

Rightful owner of common stock—expiration of statute of limitations—laches—The trial court did not err by granting defendant RBC's motion for summary judgment in a suit seeking declarative and compensatory relief claiming that plaintiff was the rightful owner of at least 14,486 shares of RBC common stock. The applicable statute of limitations and the doctrine of laches barred plaintiff's claims. **Stratton v. Royal Bank of Canada**, 78.

DIVORCE

Equitable distribution—classification—marital property—insurance check to repair roof—bank account—The trial court did not err in an equitable distribution case by failing to classify and distribute as marital property a check for \$2,288.26 from an insurance company to repair the roof of the marital home. The money was part of the value assigned to the house and land. However, the case was remanded for findings related to plaintiff's Piedmont Aviation Credit Union account and for amending the equitable distribution order if necessary solely on the basis of those findings. **Cheek v. Cheek, 183**

Equitable distribution—retirement accounts—diminution in value—insufficient findings on active or passive forces—The trial court erred in an equitable distribution case by its distribution of the parties' retirement accounts. The case was remanded for entry of findings of fact as to whether the decreases in property were due to the actions of defendant wife or passive forces, and for any adjustments of the award consistent with those findings. **Cheek v. Cheek, 183.**

Equitable distribution—retirement accounts—tax—consequences—The trial court did not abuse its discretion in an equitable distribution case by failing to award an in-kind distribution of the marital and divisible property for plaintiff's retirement accounts. The trial court was not required to consider tax consequences when no such evidence was placed before it. **Cheek v. Cheek, 183.**

DRUGS

Cocaine trafficking—admission of unidentified white powder—not prejudicial—other evidence—Defendant could not show that the admission of a white plastic bag containing an unidentified white powder was prejudicial in a cocaine prosecution where another bag of cocaine, weighing eighty-three grams, was properly admitted into evidence. **State v. Cobos, 536.**

EMPLOYER AND EMPLOYEE

Retaliatory Employment Discrimination Act—reason for termination—summary judgment improper—The trial court erred by granting defendant employer's motion for summary judgment in a case alleging termination in violation of the Retaliatory Employment Discrimination Act. There was a genuine issue of material fact as to why plaintiff was terminated after he exercised his right to file a workers' compensation claim. **McDowell v. Cent. Station Original Interiors, Inc., 159.**

EVIDENCE

Admission of evidence of guns—no plain error—The trial court did not commit plain error in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by admitting evidence of guns found by law enforcement officers during the search of defendant's family residence. Even assuming the admission of the evidence of the guns was error, defendant fell far short of convincing the Court of Appeals that a different outcome would have resulted absent the alleged error. **State v. Stevenson, 583.**

Admission of witness's prior statement—failure to show prejudice—The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by allow-

EVIDENCE—Continued

ing a witness to read to the jury a portion of her prior statement to police. Assuming *arguendo* that it was error for the trial court to admit the statement, defendant failed to satisfy his burden in showing that he was prejudiced by the alleged error. **State v. Stevenson, 583.**

Cocaine—lay identification—not prejudicial—Where an eighty-three gram bag of cocaine was properly admitted into evidence, there was no plain error in the admission of an investigator's lay identification of a white powder in another bag as cocaine. **State v. Cobos, 536.**

Judicial notice—Federal Register—regulations cited not relevant—The trial court did not err in a driving while license revoked case by not taking judicial notice of the Federal Register because the federal regulations defendant cited had no relevance to the North Carolina crime of driving while license revoked. **State v. Leyshon, 511.**

Photograph—illustrative of witness's testimony—no unfair prejudice—The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by admitting into evidence a picture of defendant holding a firearm. The photograph clearly illustrated the witness's testimony, and the trial court appropriately allowed the photograph into evidence for that purpose. Furthermore, the relevance of the picture was not substantially outweighed by the unfair prejudice to defendant. **State v. Stevenson, 583.**

Possession of incestuous pornography book—motive and intent—The trial court did not err in an indecent liberties with a child and first-degree rape case by allowing into evidence under N.C.G.S. § 8C-1, Rule 404(b) defendant father's "Family Letters" book to show both motive and intent in committing the acts underlying the charged offenses. It was reasonable to infer incestuous desire from possession of incestuous pornography, and the admission of this evidence did not unfairly prejudice defendant. To the extent the admission of evidence regarding defendant's alleged sexual encounter with the younger daughter exceeded the scope of permissible corroboration, it did not amount to plain error. **State v. Brown, 427.**

Prior incident—adolescent sexual encounter—The trial court erred in a prosecution for first-degree sexual offense and indecent liberties by admitting testimony of an incident twelve years earlier involving the victim's half-brother. Sexual exploration with a child in the same general age range is quite different from a sexual act by force by a 27 year old man upon an eleven year old child. **State v. Beckelheimer, 362.**

Prior incident—erroneous admission prejudicial—There was prejudice in a prosecution for first-degree sexual offense and indecent liberties in the erroneous admission of testimony about a prior incident where there was no physical evidence and the jurors had to decide whether to believe the victim or defendant. **State v. Beckelheimer, 362.**

FIREARMS AND OTHER WEAPONS

Discharging weapon into moving vehicle—jury instruction—The trial court's jury instructions in a discharging a weapon into a moving vehicle case were not erroneous. The instructions correctly stated the requisite mental intent

FIREARMS AND OTHER WEAPONS—Continued

and did not reduce the State's burden of proof to prove intent beyond a reasonable doubt. **State v. McLean, 321.**

FRAUD

Constructive fraud—breach of fiduciary duty—The trial court did not err by granting summary judgment in favor of plaintiff with respect to the constructive fraud claim based on a breach of fiduciary duty by defendant individuals. The execution and recordation of the notes and deeds of trust without prior approval, in amounts that greatly exceeded the value of their claimed loans, constituted a breach of fiduciary duty by defendants. Further, the evidence supported a reasonable inference that defendants' actions caused the corporation's property to remain unsold during the years that plaintiff paid the *ad valorem* taxes. **Bogovich v. Embassy Club of Sedgfield, Inc., 1.**

Negligent misrepresentation—erroneous grant of directed verdict and JNOV—The trial court erred by granting the town's motions for directed verdict and JNOV because plaintiff offered substantial evidence to support the jury's negligent misrepresentation verdict. By inquiring with proper town officials, plaintiff exercised reasonable diligence in attempting to determine how he could return to work with the town without jeopardizing his retirement benefits. Further, plaintiff presented substantial evidence that he justifiably relied on the town's representations. **Walker v. Town of Stoneville, 24.**

Sale of real estate—future adjacent development not disclosed—The trial court properly granted summary judgment for a real estate broker on a claim for fraud where the broker sold plaintiffs a coastal property with an unimpeded view of the ocean across a property that was about to be developed by the owners of the real estate agency. Plaintiffs pointed to no evidence that the broker was aware of the agency owner's actions and did not explain how the broker's actions constituted fraud rather than negligence. **Sutton v. Driver, 92.**

HIGHWAYS AND STREETS

Cartway—final judgment by clerk—exceptions after jury of view report—not reviewed—A judgment entered by the clerk ordering that a permanent cartway be established across respondents' land and appointing a jury of view became final when neither party filed exceptions or an appeal. A request for a trial *de novo* after the report of the jury of view and a request that an additional party be added were correctly denied. **Watson v. Brinkley, 190.**

HOMICIDE

Second-degree murder—erroneous failure to instruct on lesser-included offense—involuntary manslaughter—The trial court erred in a second-degree murder case by failing to instruct the jury on the lesser-included offense of involuntary manslaughter, and defendant was entitled to a new trial. There was a reasonable possibility that the jury might have concluded that defendant acted without intent to kill or inflict serious bodily injury. **State v. Debiase, 497.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—ALJ findings—sufficient—The Department of Health and Human Services sufficiently complied with N.C.G.S. § 150B-34(c) in its decision regarding a certificate of need for a mobile MRI. The Department clearly

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

indicated which of the administrative law judge's findings it adopted and which it rejected before it stated that the rejected findings were unsupported by the clear preponderance of the evidence. The statute did not require the Department to state its reasons for rejecting each finding separately. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—application—criteria not satisfied—denied rather than approved conditionally—The Department of Health and Human Services did not err by concluding that a certificate of need (CON) application must satisfy all of the review criteria in N.C.G.S. § 131E-183(a) and that an applicant was not entitled to a CON as a matter of law if the application did not conform with any one of the criteria. In this case, many deficiencies were found in the application and the record contained no indication that the Department acted unreasonably by simply denying the application rather than approving it subject to a condition. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—burden of proving error—presumption that agency performed duties—The Department of Health and Human Services when considering a certificate of need (CON) for a mobile MRI did not presume that the CON Section acted in accord with applicable law when it noted that there was a presumption that an administrative agency has properly performed its official duties. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—denial not arbitrary and capricious—The Department of Health and Human Services did not arbitrarily and capriciously deny an application for a certificate of need where a careful examination of the Department's decision revealed that it thoroughly considered and analyzed the record evidence, and adequately explained the reasons that caused it to conclude that petitioner had failed to satisfy all of the relevant criteria. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—failure to credit petitioner's evidence—no error—The Department of Health and Human Services did not err by failing to credit and act upon the evidence that petitioner offered in a certificate of need proceeding in an attempt to establish a need for a proposed mobile MRI scanner. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—findings—form of review—not de novo—A petitioner for a certificate of need (CON) for a mobile MRI was not entitled to relief based solely on the form of the Department of Health and Human Services findings. The statutorily authorized administrative review of a CON Section decision is intended to consist of an examination of the correctness of the decision rather than a *de novo* examination of the merits of the original application. Moreover, the Department clearly adopted the CON Section's findings as its own and was not simply reciting the determinations made by the CON Section in the challenged findings. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—need not shown—A careful examination of the record demonstrated that the Department of Health and Human Services had an adequate basis for its conclusion that a petitioner seeking a certificate of need had

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

not made the requisite showing of need. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—projection of need—methodology—The Department of Health and Human Services did not err by concluding that petitioner's certificate of need application did not conform with 10 N.C.A.C. 14C.2703(a)(2) and (3). The Department rejected petitioner's projection of the procedures that would be performed on the proposed scanner in the third year because petitioner did not adequately explain the methodology used to develop the projection. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—review by CON Section —The Department of Health and Human Services did not err when considering a certificate of need (CON) for a mobile MRI by focusing on the ways in which the decision of the CON Section was alleged to be unlawful rather than systematically asking whether the CON Section's decision exceeded its authority and then moving through each of the other grounds for reversal set out by statute. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—standard of review—not arbitrary and capricious—The Department of Health and Human Services did not err by reviewing a Certificate of Need Section decision by an arbitrary and capricious standard instead of considering all of the grounds for error outlined in N.C.G.S. § 150B-23(a). **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

Certificate of need—whole record test—The whole record test applied to review of a Department of Health and Human Services decision on a petition for a certificate of need for a mobile MRI scanner to the extent that petitioner's argument rested on a contention that the Department's findings lacked adequate evidentiary support or that it failed to make findings in accord with the undisputed evidence. **E. Carolina Internal Med., P.A. v. N.C. Dep't of Health and Human Servs., 397.**

IMMUNITY

Governmental—proprietary function—operation of party facilities at public park—The trial court did not err in a negligence case by denying defendant county's limited motion for summary judgment based on governmental immunity because defendant was involved in a proprietary function in the operation of the party facilities at a public park. **Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't, 627.**

INDICTMENT AND INFORMATION

Cocaine trafficking—amount omitted—added by amendment—no subject matter jurisdiction—The trial court lacked subject matter jurisdiction to try defendant for conspiracy to traffic in cocaine where the initial indictment did not specify the amount of cocaine involved, an essential element. An indictment may not be amended to substantially alter the charge in the indictment, and a party may not consent to subject matter jurisdiction. **State v. Cobos, 536.**

JURISDICTION

Standing—challenge—Certificate of Appropriateness—special damages shown—Petitioner established the special damages necessary to confer standing to challenge the Board of Adjustment's order requiring the Beaufort Historic Preservation Commission to issue a Certificate of Appropriateness to respondent Smith for the structure Smith proposed to build. **Sanchez v. Town of Beaufort**, 574.

Subject matter—juvenile delinquent—Department of Juvenile Justice and Delinquency Prevention—The district court had subject matter jurisdiction in a juvenile delinquency case to order that defendant have no home or overnight visits and that defendant be allowed to work off campus only on the condition that he not be around anyone twenty-five years of age or younger. The court retained jurisdiction even though the juvenile had been committed to the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center. **In re J.S.W.**, 620.

Subject matter—objection to claim for exempt property—superior court—Plaintiff's argument that the trial court lacked jurisdiction over his objection to defendant's claim for exempt property in an action arising from an unpaid debt was overruled. The relevant statutory language in N.C.G.S. § 1C-1603(e)(7) neither deprives the superior court of jurisdiction nor renders a superior court order ruling on such an objection void for lack of jurisdiction. **Stewart v. Hodge**, 605.

JURY

Request for transcript—trial court's denial—no abuse of discretion—The trial court did not err in a first-degree murder, first-degree kidnapping, robbery with a firearm, and conspiracy to commit robbery with a firearm case by failing to meaningfully evaluate and exercise its discretion with respect to the jury's request for a transcript of a witness's trial testimony. By summoning the jurors and exercising its discretion regarding the jury's request, the trial court in this case complied with the requirements of N.C.G.S. § 15A-1233. **State v. Stevenson**, 583.

Verdict sheet—properly reflected material controversies involved—The trial court did not improperly submit an insufficient verdict sheet to the jury in a negligent misrepresentation case. The issues submitted properly reflected the material controversies involved. **Walker v. Town of Stoneville**, 24.

JUVENILES

Delinquency—district court order—exercised discretion in accordance with statute—The district court did not abuse its discretion in a juvenile delinquency case by entering an order that defendant have no home or overnight visits and that defendant be allowed to work off campus only on the condition that he not be around anyone twenty-five years of age or younger. Taken as a whole, the district court's statements and decision demonstrated that it exercised its discretion in accordance with the criteria set forth in N.C.G.S. § 7B-2501(c). **In re J.S.W.**, 620.

Disposition order—required findings—A juvenile disposition order was remanded where the order did not demonstrate that the court considered the factors listed in N.C.G.S. § 7B-2501. **In re V.M.**, 389.

MEDICAL MALPRACTICE

Rule 9(j)—order extending statute of limitations—not effective—not filed—An order under N.C.G.S. § 1A-1, Rule 9(j) extending the statute of limitations must be filed to be effective and the trial court in this case correctly dismissed the complaint because a Rule 9(j) order that was signed but never filed did not extend the statute of limitations. **Watson v. Price, 369.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—debt—evidence of rescission—properly excluded—The trial court did not err in a foreclosure case by refusing to consider respondents' defense that the debt petitioner sought to foreclose was not a valid debt. The trial court properly refused to consider respondents' evidence of rescission because rescission is an equitable remedy which is not properly raised in a hearing held pursuant to N.C.G.S. § 45-21.16. **In re Foreclosure of Gilbert, 483.**

Foreclosure—petitioner not holder of note—The trial court erred in ordering the foreclosure of respondents' house to proceed as petitioner did not prove that it was the holder of the note with the right to foreclose under the instrument as required by N.C.G.S. § 45-21.16(d)(i) and (iii). **In re Foreclosure of Gilbert, 483.**

NEGLIGENCE

Professional negligence—contributory negligence—evidence admissible—jury instruction proper—The trial court did not err in admitting evidence about and instructing the jury on contributory negligence in plaintiff's professional negligence action against defendant Baker. Contributory negligence is a defense to a claim of professional negligence by attorneys, and the evidence supported a reasonable inference of contributory negligence on plaintiff's part. **Piraino Bros. LLC v. Atl. Fin. Grp., Inc., 343.**

Professional negligence—expert testimony—standard of care—Plaintiff's argument in a professional negligence case that defendant Baker's expert was allowed to testify about the standard of care owed to a commercial lender rather than that applicable to an individual investor was rejected. The expert testified that the standard of care he was discussing was applicable to a non-regulated private lender such as plaintiff. **Piraino Bros. LLC v. Atl. Fin. Grp., Inc., 343.**

Professional negligence—findings of fact—burden of proof—denial of involuntary dismissal motion—The trial court did not err in a professional negligence case by denying defendants' motion for involuntary dismissal. The key findings of fact challenged by defendants were supported by evidence in the record and the court applied the correct burden of proof to the critical finding of fact. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC, 295.**

PRETRIAL PROCEEDINGS

Motion for leave to amend complaint—negligence action—no abuse of discretion—The trial court did not abuse its discretion in denying plaintiff's motion for leave to amend her complaint in a negligence action where plaintiff's amended complaint sought to add two new parties to her action after the statute of limitations had expired. **Williams v. Owens, 393.**

PRETRIAL PROCEEDINGS—Continued

Motion to amend summonses—motion to enlarge time to issue summonses—material prejudice—denial not abuse of discretion—The trial court did not abuse its discretion in a medical malpractice action by denying plaintiff's Motion to Amend Summonses and/or in the Alternative to Enlarge Time to Issue Summonses. Defendants would have suffered material prejudice had the trial court granted plaintiff's motion or motions. **Stinchcomb v. Presbyterian Med. Care Corp.**, 556.

Motion to dismiss—negligence action—properly allowed—The trial court did not err in granting defendant's motion to dismiss in a negligence action where the trial court properly denied plaintiff's motion for leave to amend her complaint to add two new parties to the action after the statute of limitations had expired. **Williams v. Owens**, 393.

PROCESS AND SERVICE

Florida law—improper service—lack of personal jurisdiction—no res judicata or collateral estoppel effect on North Carolina action—The trial court erred by granting defendant's motion for judgment on the pleadings because a Florida court lacked personal jurisdiction over plaintiff in the Florida action. Defendant never properly served plaintiff with process, and therefore, the Florida court's judgment had no *res judicata* or collateral estoppel effect on plaintiff's North Carolina action. **B. Kelley Enters., Inc. v. Vitacost.com, Inc.**, 592.

Service of process—due diligence—service by publication—compliance with statutory requirements—The trial court did not abuse its discretion in denying defendant's motion to set aside an entry of default against him in a construction loan case. Plaintiff exercised due diligence in attempting to locate defendant for purposes of service of process and plaintiff complied with all the statutory requirements for service of process by publication. **Jones v. Wallis**, 353.

PUBLIC OFFICERS AND EMPLOYEES

Wrongful discharge—regular employee—payroll method—The trial court erred by directing a verdict against plaintiff on his wrongful discharge claim. Plaintiff offered substantial evidence that the town regularly employed 15 or more employees based on the payroll method as required by N.C.G.S. § 143-422.2. **Walker v. Town of Stoneville**, 24.

PUBLIC RECORDS

Open Meetings Law—misapprehension of order—case properly dismissed—immediate hearing—no prejudice—Plaintiffs' argument on appeal in an action seeking relief under North Carolina's Open Meetings Law that the trial court "dismissed" their complaint *ex mero motu* was a misapprehension of the trial court's order. The trial court made findings of fact and conclusions of law and ruled upon the merits of plaintiffs' claims, and as there were no further claims to be determined, dismissed the case. Defendant's argument that the trial court erred by hearing the case on the merits only eight days after the complaint was filed and before an answer was filed or discovery was conducted was overruled. Defendants suffered no prejudice from the "immediate" hearing, as the judgment was predominantly in their favor and denied the most significant relief sought by plaintiffs. **Garlock v. Wake Cnty. Bd. of Educ.**, 200.

PUBLIC RECORDS—Continued

Open Meetings Law—violations—no affirmative relief—The trial court in an action concerning North Carolina's Open Meetings Law (OML) properly found violations of the OML as to a ticketing procedure put into place and in the exclusion of the public from a Committee of the Whole meeting. The trial court erred in concluding that a violation of the OML occurred when defendants failed to make accommodations for members of the public who were disabled. The trial court did not abuse its discretion by denying plaintiffs affirmative relief for defendants' violations. **Garlock v. Wake Cnty. Bd. of Educ.**, 200.

REAL ESTATE

Fraud and negligent misrepresentation—development of adjacent tract—Summary judgment should not have been granted for a real estate brokerage and its owners on fraud and negligent misrepresentation claims where the brokerage sold coastal property with a view of the ocean over an adjacent tract without disclosing that the brokerage owners and others were planning the development of the adjacent tract. **Sutton v. Driver**, 92.

Negligent misrepresentation—failure to disclose planned adjacent development—The trial court should not have granted summary judgment for a real estate broker on a negligent misrepresentation claim arising from the sale of coastal property with a view of the ocean that was about to be obstructed by a development in which the real estate agency's owners were participating. The broker did not speak to the owner of the agency about the possible development of the adjacent property; it was for the jury to decide why he did not do so and whether he failed to act with reasonable diligence. **Sutton v. Driver**, 92.

Undisclosed information—liability of sellers—Summary judgment against the sellers of coastal property was reversed on claims of fraud and negligent misrepresentation because the principal is liable for the fraudulent acts of his real estate agent. However, summary judgment for the sellers was affirmed on a claim of unfair and deceptive trade practice because they did not become realtors engaged in trade or commerce simply by selling their property. **Sutton v. Driver**, 92.

SATELLITE-BASED MONITORING

Aggravated offense—first-degree rape of child under thirteen—The trial court did not err by ordering defendant to enroll in satellite-based monitoring for the rest of his natural life after he was convicted of the first-degree rape of a child. Although the trial court's determination of an aggravated offense could not be upheld based on the "child victim" prong of N.C.G.S. § 14-208.6(1a) and the underlying factual scenario could not be considered, the elements of first-degree rape as defined in N.C.G.S. § 14-27.2(a)(1) gave the trial court ample basis for determining that defendant committed an act involving vaginal penetration. Since a child under the age of thirteen is inherently incapable of consenting to sexual intercourse, the rape of such a victim necessarily involves the use of force or the threat of serious violence and the definition of aggravated offense was satisfied by the "violent conduct" prong of N.C.G.S. § 14-208.6(1a). **State v. Clark**, 60.

Highest level of supervision—sufficiency of additional findings—The Court of Appeals granted defendant's petition for writ of *certiorari* under N.C. R.

SATELLITE-BASED MONITORING

App. P. 21 and concluded that the trial court did not err by enrolling defendant in the satellite-based program for a period of five years. The trial court's additional findings that defendant had not received treatment and that the victims were very young were proper findings to support the trial court's determination that defendant required the highest possible level of supervision. **State v. Green, 599.**

Lifetime enrollment—aggravated offense—rape of child under thirteen—The trial court did not err in an indecent liberties with a child and first-degree rape case by ordering defendant to enroll in lifetime satellite-based monitoring. Rape of a child under the age of thirteen was an aggravated offense since it necessarily involved the use of force or threat of serious violence. **State v. Brown, 427.**

SENTENCING

Vacated death sentences—resentenced to consecutive life sentences—The trial court did not err in a first-degree murder case by imposing consecutive rather than concurrent sentences for life imprisonment after defendant's two death sentences for first-degree murder were vacated and he was resentenced. **State v. Goode, 637.**

SEXUAL OFFENDERS

Registration as sex offender—language of statute not unconstitutionally vague—Defendant's argument that the trial court erred in a secret peeping case by requiring him to register as a sex offender was overruled. The language of the applicable statute, N.C.G.S. § 14-202(l), was not unconstitutionally vague. **State v. Pell, 376.**

Registration as sex offender—no competent evidence defendant a danger to community—The trial court erred in a secret peeping case by requiring defendant to register as a sex offender. There was no competent evidence to support a finding that defendant was a danger to the community, or that his registration would further the purposes of N.C.G.S. § 14-208.5. **State v. Pell, 376.**

SEXUAL OFFENSES

Crime against nature—mentally disabled victim—evidence not sufficient—The trial court erred by denying defendant's motion to dismiss the charge of crime against nature where the State's theory was that defendant committed the offense against a mentally disabled person who was incapable of consenting to any sexual acts. There was insufficient evidence that she was incapable of consenting. **State v. Hunt, 452.**

Second-degree—mentally disabled victim—evidence not sufficient—The trial court erred by denying defendant's motion to dismiss a charge of second-degree sex offense where defendant contended that there was insufficient evidence that the victim was mentally disabled. The first element of mental disability under N.C.G.S. § 14-27.1(1) is "mental retardation;" however, there is a wide range of abilities among those with such a diagnosis and the evidence must also show that the victim was substantially incapable of appraising the nature of his or her conduct, of resisting a sexual act, or of communicating unwillingness to submit to a sexual act. The State's evidence did not satisfy the latter requirement. **State v. Hunt, 452.**

STATUTES OF LIMITATION AND REPOSE

Medical malpractice—complaint filed after expiration of statute of limitations—summonses not timely issued—The trial court did not err in a medical malpractice action by granting defendants' motions to dismiss for plaintiff's failure to comply with the statute of limitations. Because the statute of limitations expired the day after plaintiff filed his complaint, and plaintiff failed to issue timely summonses to defendants, plaintiff failed to commence his action against defendants within the statute of limitations. **Stinchomb v. Presbyterian Med. Care Corp.**, 556.

Professional negligence—claims barred—The trial court in a professional negligence case did not err by concluding that a portion of plaintiffs' claims were barred by the applicable statute of limitations. The trial court's findings of fact supported its conclusions of law that claims against defendants for legal malpractice during the period October 2003 through April 2004 were barred by the three-year statute of limitations; individual defendant's renewed representation on the same matter as he previously advised did not halt the running of the statute; and when defendants did not represent plaintiffs individually, there was no reasonable third-party reliance. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC**, 295.

Professional negligence—claims not barred—The trial court did not err in a professional negligence case by denying defendants' motion for involuntary dismissal. The trial court correctly determined that a portion of plaintiffs' claims were not barred by the applicable statute of limitations. **Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC**, 295.

Reimbursement for business expenses—no tolling of statute—The trial court did not err by concluding that defendant individual's reimbursement claims for alleged monies advanced and other obligations related to the corporation that allegedly arose in the 1970s and 1980s were barred by the statute of limitations under N.C.G.S. § 1-52(1). Even if the applicable statute of limitations had been tolled until 1998, defendants never asserted a reimbursement claim. **Bogovich v. Embassy Club of Sedgefield, Inc.**, 1.

TORT CLAIMS ACT

University medical school — medical negligence—collateral estoppel—jurisdiction—The Industrial Commission did not err by granting summary judgment in favor of defendant for a medical negligence claim that plaintiff brought pursuant to the State Tort Claims Act under N.C.G.S. §§ 143-291 - 300.1A based on the doctrine of collateral estoppel. Plaintiff's challenges to the Commission's order based on the nature of the proceedings leading up to the entry of the summary judgment order and the contents of that order lacked merit. Further, plaintiff's "absence of jurisdiction" argument also lacked merit. **Urquhart v. East Carolina Sch. of Med.**, 124.

TRIALS

Law of the case—same issues—questions settled—The trial court did not err in a defamation *per se* and unfair and deceptive trade practices case by treating *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25 (*Boyce I*), as controlling law of the case. Because many of the same issues from *Boyce I* arose on review in this case, the questions settled in the Court of Appeals' prior opinion were controlling here. **Boyce & Isley, PLLC v. Cooper**, 469.

TRUSTS

Breach of express trust—civil conspiracy—conversion—summary judgment proper—The trial court did not err in granting summary judgment to the Burris defendants on plaintiff's claims for breach of an express trust and civil conspiracy. Plaintiff failed to preserve the issue of an express trust for appellate review and the Burris defendants did not owe plaintiff a fiduciary duty. Furthermore, plaintiff did not argue that the trial court erred in dismissing plaintiff's underlying conversion claim. **Piraino Bros. LLC v. Atl. Fin. Grp., Inc.**, 343.

UNFAIR TRADE PRACTICES

Defamation—genuine issue of material fact—actual malice—The trial court did not erroneously fail to grant defendants' motion for summary judgment in a defamation *per se* and unfair and deceptive trade practices case. There were genuine issues of material fact as to whether defendants acted with actual malice as to plaintiff Daniel Boyce in the airing of a political advertisement. As for the remaining plaintiffs, there was a genuine issue of material fact as to whether the actual malice standard was applicable. **Boyce & Isley, PLLC v. Cooper**, 469.

Defamation—genuine issue of material fact—false statements—denial of summary judgment—The trial court did not err in a defamation *per se* and unfair and deceptive trade practices case by denying defendants' motion for summary judgment. There was, at the very least, a genuine issue of material fact as to whether the statements made in defendants' political advertisement were false. **Boyce & Isley, PLLC v. Cooper**, 469.

Defamation—statements of or concerning plaintiffs—determination controlling—The trial court did not err by denying defendants' motion for summary judgment as to all plaintiffs other than Dan Boyce in a defamation *per se* and unfair and deceptive trade practices case. In **Boyce & Isley, PLLC v. Cooper**, 153 N.C. App. 25, (*Boyce I*) the Court of Appeals determined that statements in the political advertisement were "of or concerning" plaintiffs and that determination was controlling in this case. **Boyce & Isley, PLLC v. Cooper**, 469.

Genuine issue of material fact—defamation—sufficient evidence—The trial court did not erroneously fail to find that there was no genuine issue of material fact with respect to plaintiffs' unfair and deceptive trade practices cause of action because plaintiffs were able to forecast sufficient evidence to support a defamation cause of action. **Boyce & Isley, PLLC v. Cooper**, 469.

Real estate sale—undisclosed information—Summary judgment for the owners of a real estate brokerage and a broker on an unfair and deceptive practices claim arising from the sale of coastal land with an ocean view was reversed where the owners of the brokerage were involved in a project to develop adjacent land that would block the ocean view. A claim of unfair and deceptive trade practice can be established against realtors by proving either fraud or negligent misrepresentation in a commercial setting. **Sutton v. Driver**, 92.

Summary judgment—constructive fraud—The trial court did not err by granting summary judgment in favor of plaintiff with respect to the unfair and deceptive trade practices claim given the upholding of summary judgment in favor of plaintiff for the constructive fraud claim. **Bogovich v. Embassy Club of Sedgfield, Inc.**, 1.

UNFAIR TRADE PRACTICES

Tortious interference with contract—summary judgment proper—The trial court did not err by granting defendants' motion for summary judgment on the actions for unfair and deceptive trade practices and tortious interference with contract. There were no genuine issues of material fact on these claims and defendants were entitled to judgments as a matter of law. **Harty v. Underhill, 546.**

UNIFORM COMMERCIAL CODE

Breached contract—recovery of deposit—Plaintiff was entitled under the U.C.C. to recover the amount of the purchase price it had already paid (plus interest) for the construction of a sport fishing boat that was not finished on time and was ultimately sold to someone else. **D.G. II, LLC v. Nix, 332.**

UNJUST ENRICHMENT

Insurance proceeds—JNOV properly granted—The trial court did not err in granting plaintiff's motion for JNOV on plaintiff's claim against defendant James Massengill & Sons Construction Company (JMS) for unjust enrichment. All the elements of plaintiff's unjust enrichment claim were met as a matter of law and JMS failed to prove an irrevocable and material change of position such that it would be unjust to require JMS to refund the proceeds. Furthermore, because JMS could not show any real injury or damages, the issue of balancing the relative equities was not for the jury to consider. **Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co., 252.**

WATERS AND ADJOINING LANDS

Riparian rights—eminent domain—just compensation—The trial court did not err by determining that defendant had taken plaintiffs' riparian rights and that plaintiffs were entitled to compensation from defendant for the taking. Although the impoundment statutes and N.C. Environmental Management Commission (EMC) certificate authorized defendant to exercise its power of eminent domain by diverting the water flow in a river in order to develop a public water supply, defendant was obligated to pay just compensation. Further, plaintiffs introduced the necessary evidence to determine the rate of water flow. **L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth., 148.**

WORKERS' COMPENSATION

Additional medical treatment—properly determined—The Industrial Commission properly determined that plaintiff was entitled to additional medical treatment reasonably related to his compensable hand injury. **Heatherly v. The Hollingsworth Co., Inc., 282.**

Attendant care—reasonable and medically necessary—misapprehension of law—matter remanded—The Industrial Commission erred by concluding there was insufficient competent medical evidence to establish that attendant care was reasonable and necessary as a result of decedent's compensable asbestosis. The Commission's requirement that a physician's prescription was a prerequisite to attendant care compensation constituted a misapprehension of law. The matter was remanded for a new determination using the correct legal standard. **In re Estate of Gainey v. Southern Flooring & Acoustical Co., 233.**

WORKERS' COMPENSATION—Continued

Calculation of accrued interest—date of initial hearing—The Industrial Commission erred by denying plaintiff's motion to have the accrued interest related to his workers' compensation benefits calculated from 1 March 2004 instead of 1 May 2006. The initial hearing concerning plaintiff's claim for purposes of N.C.G.S. § 97-86.2 was held on 1 March 2004. The case was remanded to the Commission for further proceedings. **Puckett v. Norandal USA, Inc.**, 565.

Compensable injury—increased risk—lightning strike—expert testimony not required—findings and conclusions—The Industrial Commission did not err in a workers' compensation case in finding and concluding that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment. Plaintiff was not required to present expert evidence to establish that his employment exposed him to an "increased risk" of being struck by lightning. The non-expert evidence supported the Commission's findings which, in turn, supported the conclusion that plaintiff's employment peculiarly exposed him to risk of injury from lightning greater than that of other persons in the community. **Heatherly v. The Hollingsworth Co., Inc.**, 282.

Death—not significantly caused by asbestosis—findings and conclusions—The Industrial Commission did not err by concluding that decedent's asbestosis neither caused nor significantly contributed to decedent's death. A doctor's testimony supported the Commission's findings, and in turn its conclusion, that asbestosis did not significantly contribute to decedent's death. **In re Estate of Gainey v. Southern Flooring & Acoustical Co.**, 233.

Temporary total disability benefits—testimony sufficient—The Industrial Commission did not erroneously conclude in a workers' compensation case that plaintiff was entitled to temporary total disability benefits for the period of 12 July 2004 to 2 January 2005. Plaintiff's testimony regarding the pain in his fractured right hand and his inability to work at all was sufficient to support the Commission's determination that plaintiff was temporarily totally disabled during the relevant period. **Heatherly v. The Hollingsworth Co., Inc.**, 282.

Temporary total disability—incurred and future medical treatment—The Industrial Commission did not err in a workers' compensation case by awarding ongoing temporary total disability benefits and all incurred and future medical treatment. The evidence supported a doctor's opinion that plaintiff's condition necessitating her surgery and causing her disability was the direct result of her 26 February injury and the three subsequent work-related aggravations. **Cawthorn v. Mission Hosp., Inc.**, 42.

WRONGFUL DEATH

Woodson claim—inapplicable to any party other than employer—The trial court did not err in a wrongful death case by granting summary judgment in favor of defendant insurance carrier and dismissing plaintiff's complaint. Defendant was never the employer and thus plaintiff could not state a *Woodson* claim against this defendant. **Gentry v. Big Creek Underground Utils., Inc.**, 641.

